

CLERK'S COPY.

Vol. II
TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 497

**A. M. ANDERSON, RECEIVER OF NATIONAL BANK
OF KENTUCKY, OF LOUISVILLE, PETITIONER,**

vs.

**KATHERINE KIRKPATRICK ABBOTT, ADMINIS-
TRATRIX WITH THE WILL ANNEXED OF THE
ESTATE OF DAVID J. ABBOTT, DECEASED,
ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT**

PETITION FOR CERTIORARI FILED OCTOBER 28, 1942.

CERTIORARI GRANTED DECEMBER 7, 1942.

IN THE
Supreme Court of the United States

October Term, 1942

No. 497

A. M. ANDERSON, Receiver of the National Bank of
Kentucky,

v.

Petitioner,

KATHERINE KIRKPATRICK ABBOTT, Administra-
trix of the Estate of David J. Abbott, deceased, et al.,
Respondents.

Transcript of Record

On Petition for Writ of Certiorari to the United States
Circuit Court of Appeals for the Sixth Circuit

VOLUME II

ROBERT S. MARX,
FRANK E. WOOD,
NICHOLS, WOOD, MARX & GINTER,
Cincinnati, Ohio,

ALFRED C. KRIEGER,
Louisville, Ky.,

Attorneys for Petitioner.

LAFON ALLEN,
W. W. CRAWFORD,
ALLEN P. DODD,
Louisville, Ky.,

Attorneys for Respondents.

Volume II

TABLE OF CONTENTS

	PAGE
Opening Statement of Mr. Marx on Behalf of Plaintiff	1
(Included in record pursuant to designation cross-appellant Susie E. Tellman et al., Vol. I P. 296)	
Opening Statement of Mr. Allen P. Dodd on Behalf of Defendants	44
Plaintiff's Evidence	74
Stipulation—Plaintiff's Request for Admissions and Defendants' Response	74
Earl R. Muir	116
Fred W. Gates	117
Hugh A. White	121
Robert Neill	140
Russell Mooney	167
John S. Wood	169
Arthur H. Almstedt	183
John C. Wickliffe, Jr.	184
Fred B. Stewart	189
Defendants Evidence	192
Stipulation—Defendants' Request for Admissions and Plaintiff's Response	192
T. E. Burkholder	205
Allen P. Dodd	216
Timothy Graham Donovan	298

District Court of the United States

A. M. ANDERSON, Receiver of the National Bank of
Kentucky,

Appellant,

v.

KATHERINE KIRKPATRICK ABBOTT, Administra-
trix of the Estate of David J. Abbott, deceased, et al.,

Appellees.

OPENING STATEMENT OF MR. MARX ON BEHALF OF PLAINTIFF

(Included in record pursuant to designation cross-appel-
lants Susie E. Tellman et al., Vol. I, p. 296.)

Mr. Marx: If the Court please, it is not our purpose to make too elaborate a statement, nor to go into all of the evidential facts which are necessary to support the allegations in the Bill of Complaint. Your Honor has suggested, however, that some outline of the claims of the plaintiff might be helpful, and I will state those verbally and without any detailed notes, facts or figures before me, so that I don't want to be held too closely to any statement of dates or figures, just to the general outline. I had not originally intended to make an opening statement, thinking we might save time by waiving it; I have not prepared a statement and I will just talk ad lib.

The Court: It is not necessary to go into the history of the matter; just state the issue on which you want to introduce proof.

Mr. Marx: Well, I think it is necessary, however; to state very succinctly a little bit of the history in order to bring

Opening Statement of Mr. Marx

out the sequence of events, because prior to April 22, 1927, this was just the ordinary relationship of stockholders of a bank of record on one side and the depositors of the bank on the other. I mean by that, in 1925 or 1926 a depositor put his money into the bank and there stood of record a long list of individuals on the Stock Ledger of the bank who had invested their money in the shares of stock in the bank, and who were subject to a stock assessment in the event of the failure of the bank. These individuals, who were the stockholders of the bank and were liable for double assessment were the real, actual, and at that time, prior to April 22, 1927, the record holders on the stock ledger of the bank, and they well knew then and at all subsequent times, that they were liable, under Federal law, to the payment of double the amount of their investment as an assessment.

The proof will show that along in April of 1927 these stockholders, who were the real, true, actual and record holders of the stock of the National Bank of Kentucky, and who were making the profits out of the operation of the bank and the use of the depositors' money, conceived the idea of joining forces with a state institution known as the Louisville Trust Company. They, I think the evidence will show, wrote to the Comptroller of Currency of the United States about it and were advised that under the applicable federal laws there was a legal way by which they could merge or consolidate. However, they chose to do it another way, without going through the process required by law to accomplish a merger or consolidation. They undertook to accomplish indirectly the same thing, and they, the stockholders of the National Bank of Kentucky and the stockholders of the Louisville Trust Company, put all of their stock into the hands of six men whom they designated as Trustees. I think the evidence will show that all of the certificates of stock of both the National Bank of Kentucky

Opening Statement of Mr. Marx

and the Louisville Trust Company were placed in the hands of these Trustees. Subsequently the Trustees caused to be registered in the name of the directors of the bank and the trust company, ten shares of stock apiece, in order to qualify them to act as directors. Whether or not that was a real qualification, as contemplated within the spirit of the law and letter of the law, Your Honor will have to determine, but the physical possession and custody of the stock was in the hands of these Trustees.

I may say the evidence will show there was a formal trust instrument executed, dated April 22, 1927, the detailed terms of which I will omit at this time, except to say that under that instrument the man who owned a \$100 stock certificate in the National Bank of Kentucky received in exchange from the trustees a \$100 trust certificate. In other words, they exchanged their bank stock for trust certificates par for par. Now, the effect of that exchange, however, was that a man who had been a stockholder in the National Bank of Kentucky continued to be a stockholder in the National Bank of Kentucky, but in a somewhat different proportion. Originally he owned \$100 interest in the National Bank of Kentucky, but when he got a Trust Certificate for \$100 his interest became relatively about \$70 in the National Bank of Kentucky and \$30—\$20, originally—in the Louisville Trust Company. In like manner, if a man owned only \$100 of Louisville Trust Company stock, when he received a \$100 Trust Certificate, he acquired a \$80 interest, at the start, later reduced to \$70, in the National Bank of Kentucky, and a \$20 interest in the Louisville Trust Company, so that his proportionate interest changed, but the Trust Certificate at all times represented the bank stock.

Now, while I am on the subject of the difference between \$70 and \$80, I may say that some time after the organiza-

Opening Statement of Mr. Marx

tion of this trust, they took in another bank, the Louisville National Bank. They took it in not by purchase money but they took it in simply by an exchange of Trust Certificates for Louisville National Bank stock, of which they issued something like 7,500 shares of the Trust Certificates—that is; 7,500 Trust Certificates in exchange for 7,500 shares of the Louisville National Bank stock, and they merged that Louisville National into the Louisville Trust Company. When that merger or consolidation came about, then the proportionate interest of a certificate holder again changed, so that whereas originally his Trust Certificate represented \$80 worth of National Bank of Kentucky and \$20 worth of Louisville Trust Company, after they took in the Louisville National his Trustees' Certificates represented \$70 in the National Bank of Kentucky and \$30 in the Louisville Trust Company. Now, I am giving these figures from memory and they are approximations. .

The Trust Certificate represented the bank stock; these six trustees had no real, independent function; they were the trustees of the bank stockholders. For example, the principal reason men invest money in a bank is to derive dividends and earn profits that come from owning bank stock for his own enrichment, and the dividends after the bank stock was trusteeed were received by the trustees and then paid out to the bank stockholders without any deduction, even for expenses, so that the bank stockholder continued to get his dividends from his bank stock from the trustees, just the same as he had previously got it from the bank, so that in every sense of the word he was still a bank stockholder. The trustees, of course, acted for the Certificate holders to such an extent that the trustees' certificate holder had a right to vote his trust certificate, directing the trustees how to vote the bank stock, so that though the trustees he even continued to exercise his voting privilege of the bank stock.

Opening Statement of Mr. Marx

That, as stated, happened in April of 1927, and that condition continued until the organization of the Banco Kentucky Company about two years later.

Now, if the Court please, the evidence will show beyond any possible dispute, and the other side will have to admit it, that during the years 1927, 1928 and 1929 up to the time they undertook to shake off their double liability these bank stockholders knew that they were liable to a double assessment under the laws of the United States, and they knew they could not shake off that liability by organizing this trust, and have it a valid and legal thing. Whether that trust was a valid method of combining a national and a state bank may or may not be important in this case, depending upon certain rules of law and certain phases of the case, but one thing is clear, that when they organized that trust, and their banks were in whatever condition the evidence will show they were in, these stockholders knew that they were liable for double assessment, and they wrote into the Trust Agreement that they would indemnify these six men who were the trustees against any liability for stock assessment by reason of the fact that the stock in the bank was then registered in the names of the trustees, because from the day they instituted that trust, Your Honor will see immediately that the situation between the depositors, whom we represent on this side of the table, and the shareholders, who are represented on the other side of the table, changed, in this particular, that the depositors could no longer go to the stock ledger and ascertain the names of record of the certificate holders directly; he had to do it indirectly, because when he looked at the stock ledger it stated that all the stock, except the stock in the names of the directors, ten shares each to qualify them, was in the names of these six trustees—all of it, if Your Honor please—there wasn't any outside of the trust, save and except the

Opening Statement of Mr. Marx

shares that were registered of record in the names of these directors, ten shares each, but the certificates of which were in a safety deposit box controlled by the trustees. F

Furthermore, the evidence will show as to those directors' qualifying shares, that they were under a contract made with the trustees that upon the failure of a director to be elected or his resignation or the attachment of the stock which he claimed, as far as the record showed, to own, by a creditor, he lost those certificates instanter, so that he, in effect, and in reality, was simply a nominee of the six trustees who held his certificates and who held a contract, if Your Honor please, providing that he lost the certificate on death, resignation, failure of election, or even attachment by a creditor.

Now, then, when he looked at the stock record he saw eighteen directors at ten shares each and all the rest of the stock of the National Bank of Kentucky was in the name of six trustees under the trust instrument of April 22, 1927. Now, they kept a stock ledger, however, of those who owned the Trustees' Certificates and a man could go to that record and see who owned the Trustees' Certificates, which represented the stock of the bank, and everybody on that record agreed, in his Trustees' Certificates, to respond to his double liability. He knew from the Trustees' Certificates and knew personally that he was subject to double liability, and that the Trustees' Certificate was subject to double liability, and that the Federal law required him to pay that liability if the bank failed. Furthermore, the depositors who put their money in that bank, and for whose benefit alone this suit is brought, had as their only guarantee in the event of the failure of the bank, the obligation of the shareholders of this bank who now held not stock but Trustees' Certificates to respond to that double liability.

Well, if Your Honor please, the evidence will show that after they organized this trust and combined the National

Opening Statement of Mr. Marr

Bank of Kentucky in this method with the Louisville National and Louisville Trust Company, the National Bank of Kentucky was gradually slipping down hill. It is immaterial for this argument or statement of facts I am making whether or not the National Bank of Kentucky was solvent or insolvent in a legal sense; in a factual sense it was going down hill; it was slipping fast; its deposits—how much were they when they started the trust—dropped probably from something like \$60,000,000 to something a little over \$30,000,000. It was losing deposits rapidly. Furthermore, if the Court please, its asset condition was becoming continually worse. I think the evidence will show here that the amount of money that it was lending to concerns like the Kentucky Wagon Works, Wakefield & Company and Caldwell & Company—loans which proved to be bad—was gradually increasing. I think the evidence will show here that the amount of money that the National Bank of Kentucky was forced to borrow was gradually increased, and I think the evidence will show here that it was unable to maintain its reserves with the Federal Reserve Bank and the amount that it was in default for its reserves was gradually increasing. It could have borrowed money to make good those reserves but its assets which it could have discounted for those loans had all been pledged, so it was required to pay penalties to the Federal Reserve Bank for failure to maintain the reserve required by law. Of course, that Federal Reserve is a requirement for the protection of depositors; they are required—I don't know the exact figures offhand—to have, say, ten per cent—well, the Federal statute covers it, but I think it is ten per cent of certain deposits and three per cent of others. Just what it was at that time will have to be shown to Your Honor by evidence. This reserve is required in order that it may have a liquid condition, so that if a run occurs it will have the resources to pay off the depositors who demand

Opening Statement of Mr. Marx

their money, and yet daily its reserve position was getting worse, so that this bank was going down hill, and it went down hill rather rapidly towards the final days, and with that condition staring them in the face, the shareholders of this bank undertook to shake off their double liability on the one hand and unload it on a holding company of their own creation. They undertook to shake off their double liability on the one hand and unload it onto a holding company of their own creation, and on the other hand, while unloading their liability, they held onto every dollar of dividends and profits that came from the bank stock; they kept every benefit of the control of their bank stock while they sought to unload their double liability onto this holding company designed primarily and principally to hold the bank stock, of their own bank stock, and to keep control of their own bank stock, and the Supreme Court of the United States and every Court of Appeals in the country has said that if you hold onto the benefits and you get the dividends and advantages of your investment in bank stock you have to respond to your liability and you cannot say the liability goes on to the holding company whose dividends go into our own pockets, but we will take millions out of the bank in dividends, but if the bank busts, then the depositors can shout for their money because they will have nothing but a busted holding company to look to. That is the law of this land and there wouldn't be a thread of confidence left in a national bank if it wasn't—

The Court: Just confine your statements, Judge, to the facts.

Mr. Marx: Well, that is what they did. Now, how did they do it? They undertook to organize a general corporation under the laws of the State of Delaware, and almost the first article that they wrote into that corporation charter was—these men sitting as bank directors, these men who were the shareholders of that bank, these men

Opening Statement of Mr. Marx

who knew that they were subject to double liability, wrote into that article of incorporation "The personal property of the shareholders thereof shall be exempt from the payment of its debts," and then, on top of that, they caused stock certificates in the company to be printed, and put on the face of them "fully paid and non-assessable" and then they said "One of the great advantages now of transferring your Trust Certificates into Banco stock is that you won't have any assessment to pay if the bank fails," and that is their position today.

Now, then, if Your Honor please, in July they organized this Delaware corporation. Who organized it? The shareholders of the bank, of the National Bank of Kentucky, and of the Louisville Trust Company, and the six trustees, and they put up the money to organize it, a \$1,000 corporation fee, out of the National Bank of Kentucky, and they sent their lawyer, Mr. Carroll, to Dover, Delaware in order to organize it. He reported back to them that it was done, and then, if the Court please, having done that, they sent out a letter to every shareholder of bank stock—I would like to read that letter to Your Honor.

The Court: That is the same letter that was discussed here on the motion to dismiss, was it not? I am familiar with its contents, having heretofore read it.

Mr. Marx: I won't read it all, then, but I do want to direct Your Honor's attention to certain parts: In the first place, this letter is sent by whom? It is sent by every director of the National Bank of Kentucky and every director of the Louisville Trust Company and every one of the six trustees, and by James B. Brown, President of the National Bank of Kentucky, and by Richard Bean, President of the Louisville Trust Company, as such. I want to stop long enough to say to Your Honor that this—it pertains to some of the defenses that the evidence will show—that this is not like a suit against the directors to

Opening Statement of Mr. Marx

recover liability for the mismanagement of their trust, in which event they may plead, say, lack of knowledge and the Court will hold only certain directors who had knowledge and certain officers who had knowledge. A stockholder could himself sue the directors for mismanagement. This is a suit between the depositors only, and they alone can participate in the suit. Against the stockholders on the other side, who chose those officers, James Brown, who signed this, Richard Bean, who signed it, and these directors who signed it, and act as their officers and their agents and their directors in the conduct of the business of this bank, all these allegations with reference to whether an individual director knew or didn't know are wholly immaterial as against the innocent depositor who is suing the corporation and its shareholders to recover what the law provides he shall have. Now, this is addressed to the holders of Trustees' Participation Shares of the National Bank of Kentucky-Louisville Trust Company—to all of them, if the Court please, and it begins "Your Officers and Directors have studied the rapidly changing conditions in the banking business in America, with a view to preparing the two banking institutions under their management, to meet these changed conditions, and to take early advantage of new opportunities presented thereby.

"2. The conclusion unanimously reached, as a result of their deliberations, is that the two banks, and the business conducted by them, should be reorganized by adding to this group a third corporation, which will make the operations of these banking institutions more profitable, expand their facilities, and thus develop for the entire group new and profitable financial opportunities and connections."

Now, I call Your Honor's attention to this reorganization, to the use of this word, because the evidence will show to Your Honor—these gentlemen have asked us to admit

Opening Statement of Mr. Marx

and we have denied it, that the BancoKentucky Company—I think Your Honor already knows, although I have omitted it in the statement of facts, that when they organized the BancoKentucky Company they offered to every shareholder in the bank two shares of BancoKentucky Company stock in exchange for one share, for one Trustees' Certificate, and those two shares, they represented, were worth \$25 apiece. In other words, they said to the shareholder of the bank, whose share was now represented by a Trustees' Certificate "If you will give us your bank stock in exchange for holding company stock we will give you \$50 in holding company stock, two shares of \$25 each." Now, mind you, the evidence will show that not a single dollar was ever put up by the BancoKentucky Company for one share of National Bank of Kentucky stock; the BancoKentucky Company never invested a single cent in the National Bank of Kentucky stock; every share of stock it got it got by an exchange of its paper, BancoKentucky Company stock, alleged to be nonassessable, in return for bank stock, which had written on its face that it was assessable.

Now, then, they asked us to admit, and we have denied, that the BancoKentucky Company, by the process of exchanging its paper for the Trust Certificates, became the true and actual owner by sale of the bank stock. Now, Your Honor will observe that under the federal laws as they then stood, if a man purchased his bank stock, say, for \$25 and he sold it to BancoKentucky for \$50 he made a capital gain of \$25, which was taxable income under the revenue laws of the United States, and this proposal was not designed as a sale, but as a reorganization, in order to escape, shall we say, or not, the federal income tax laws.

Now, the facts are that that was what they represented it to be; it was an exchange of one type of paper, representing bank stock, for another type of paper representing

Opening Statement of Mr. Marx

bank stock, an exchange of Banco, or as Judge Cochran used to call it "Bunco" shares for Trustees' Certificate Shares. Both were bank stocks, and therefore there was no capital gain, because it was merely the exchange of one form of paper for another form of paper, both of which were identical in the eyes of the law; the only difference was that one was assessable on its face and in the other they undertook to get rid of the assessment. The gentlemen on the other side are in this dilemma: That either they were honestly and seriously doing what their letters say, which we believe, or otherwise they were engaged in a gigantic scheme to cheat and defraud the United States out of hundreds of thousands of justly due income taxes. We don't charge them with any such scheme, but if they say what they got was not in pursuance to a reorganization, that the Banco Kentucky Company actually got by sale a good title, and that they lost forever to this corporation their bank stock, then they are liable to the United States Government for those income taxes, which is due, and their plan to simply have a reorganization was a hoax and a fraud, and they cannot hide behind nor shield themselves behind a corporation which was created to defraud the Government of the United States, or which had that effect. So, there are the horns of the dilemma. We charge them with no such fraud; we accept them at their own word and we ask the Court to accept them at their own word, but if they take the other horn of the dilemma, they are equally liable for the assessment, because the law does not allow you to shield yourself behind a corporation which is part of an unlawful scheme.

Now, if Your Honor please, these documents are admitted to be authentic. Mr. Robert F. Vaughan, a distinguished lawyer of this city and a man for whom I personally have a great deal of respect, was attorney for this bank.

Opening Statement of Mr. Marx

He wrote this letter to Mr. James B. Brown, President of the National Bank of Kentucky: "July 9, 1929. Dear Mr. Brown. In re: The Banco Kentucky Company"—and he wrote this letter to him, as President of the National Bank of Kentucky, because Banco had not been organized—

"Supplementing my former letter to you under date of July 6th, on yesterday I had a conversation with a lawyer, representing the Income Tax Unit at Washington, in the General Counsel's Department, who shortly expects to become a member of the firm of Miller and Chevalier, my office associates in Louisville, which firm, as heretofore explained, specializes in Federal Tax cases, with offices in Washington and New York.

"The gentleman gave as his opinion (without opportunity to study the history of the entire transaction) that it was highly important that every preliminary paper, resolution, etc., dealing with this Company and its organization, should clearly recite that the Company is a 'reorganization,' within the purview of the Revenue Act of 1928.

"In other words, the issue and delivery of two shares of stock of the Company, for one Trustees Participation Share, must be made to appear (so far as the Bank's stockholders are concerned) as a mere receipt of the same property in another form, and not as a closed transaction wherein they part with one species of property in exchange for an entirely different species of property.

"I believe we can accomplish this result, without in anywise impairing the structure of the setup already agreed upon, by prefacing the prospectus with some general remarks, as per the enclosed draft herewith submitted for your criticism."

And with it was a draft, in substance, of this letter of July 19th. Now, I haven't read it all but there will be a lot of evidence on this income tax subject and there will be a lot

Opening Statement of Mr. Marx

of evidence showing that this is what these gentlemen honestly set out to do, exchange one property for another property in the same form and not to close a transaction wherein they parted with one species of property for another, different species of property, but unless they were honest in what they said—and we believe they were sincere in what Mr. Vaughan said, as I believe he was—then, the thing was a scheme to cheat the United States out of more money than, perhaps, is involved in this stock assessment.

Now, when they did that, after that advice, they send this circular out—I have only read, Your Honor, from parts 1 and 2. Here is 3: “Such a reorganization is in line with the trend of business and finance in this country; and the strength and influence of the new corporation will not only greatly benefit the two banks and the territory they now serve, but will also be a stabilizing influence in banking circles throughout this section of the country. The new corporation can exercise many profitable and important functions which neither a bank nor a trust company has authority to exercise”—proving that these bank directors and stockholders set out, indirectly, to do things forbidden to them by law if they attempted to do them directly—“and can take advantage of many sound and profitable financial opportunities, frequently presented in the course of business of the two banks, but not available to them; because of the restrictions upon their powers and activities.

“4. The following is the Plan of Reorganization agreed upon by the Officers and Directors of the two banks, and approved by formal Resolutions of the Trustees, under the Trustees’ Agreement for the National Bank of Kentucky and The Louisville Trust Company.”

“5. There has been organized under the laws of the State of Delaware, a corporation known as The Banco-Kentucky Company, with an authorized capital of 2,000,000 shares, having a par value of Ten (\$10.00) Dollars each.

Opening Statement of Mr. Marx

The stock will be exchanged or sold, in accordance with this plan, on the basis of Twenty-five (\$25.00) Dollars per share, which will give the Company a capital of Twenty Million (\$20,000,000.00) Dollars, and a surplus of Thirty Million (\$30,000,000.00) Dollars, or a total capital and surplus of Fifty Million (\$50,000,000.00) Dollars. No stock will be sold by the Company at less than Twenty-five (\$25.00) Dollars per share."

The Court: Does that letter make any reference to a sale of the stock generally?

Mr. Marx: Under the Reorganization Plan yes, and it preempts all the stock for the bank shareholders. In other words, it invites them, as we view it, to increase their investments in bank stock—I will come to that in a minute.

"6. The corporation is given broad charter powers, including the right to acquire stocks, bonds and other securities"—and so forth.

"7. It is an essential part of this reorganization that the shares of this corporation (or at least a substantial majority thereof) be owned by the Trustees' Participation Shareholders, and that it be managed and operated"—by whom, does Your Honor think? It is an essential thing that this new corporation that we are setting up has the majority of its stock owned by the same persons who now own the bank, and that the new corporation be run, managed and operated—this is quoted—"by the Boards of Directors and the officers of the two banks. The Banco-Kentucky Company, therefore, offers to the Trustees' Participation Shareholders of the National Bank of Kentucky and The Louisville Trust Company, through the trustees as agents"—and I call Your Honor's attention to the fact that the trustees are specifically designated to be the agents of the shareholders of the bank who set up this claim—"through the Trustees as agents in the transaction, its

Opening Statement of Mr. Marx

entire capital stock, on the bases and subject to the terms and conditions hereinafter set out":

I am emphasizing some of this, Your Honor, because when you come to read the decision in the case of Barbour v. Thomas in the United States Circuit Court of Appeals, you will see that it parallels this case as we intend to put the evidence in almost line for line; the scheme there was almost the same as the scheme here, save and except that when they organized the Detroit Bank's Holding Company for the Detroit Bank and other banks, they honestly set out in their Articles of Incorporation that each stockholder would assume his proportionate part of his double liability which necessarily flowed from the ownership of bank stock, but here they set out to escape from that liability. In the Detroit case, the stockholders, when they were asked to make good on their promise, came in and said, "Because we frankly assumed it, we ought not to be held liable, because that means there was no fraud. If we denied our liability, then it would not have been immoral, but it would have been a constructive fraud, because it would have evidenced our intention to escape it." But the Court said there, "Because you were frank and assumed what the law required you to pay is no more reason for you to escape from it than if you had sought to evade it by denying liability as they did in the Metropolitan Holding Company case in the Seventh Circuit Court." They also had a non-assessable stock, and they said, "You can't get out of that," in other words, the Judge said in his opinion the purpose of the bank and trust company stockholders in forming this company was not only to extend the operation of the banks beyond the scope authorized by law under which the banks were organized, but they also deliberately sought to evade the operation of the National Bank Act and avoid liability on the bank stock. Through the Trust Agreement of 1927 the shareholders expressly acknowl-

Opening Statement of Mr. Marx

edged their liability; in the second step involving the re-organization of the bank and trust company and their business, the shareholders deliberately sought to eliminate their individual liability and to defraud depositors and creditors of the bank of the protection contemplated by the statutes, meaning the assessment liability, and we expect to prove just what Judge Sullivan says.

Now, he says the BancoKentucky Company was organized under the general laws of Delaware authorizing it to do any business except banking, and one of its purposes was to engage in speculative enterprises forbidden to banks, and while the bank had apparently a separate existence, it was intended to be and was the agent of the bank, and it was operated by the bank officers. That is what they said in this letter (indicating), that the bank's shareholders were to own the bank, and that the Banco Company was to be operated by the directors and officers of the bank, and through it the bank's shareholders were to engage in general banking, and through it they hoped to defraud the depositors by substituting for the stockholders' personal liability only the bank stock itself.

Now, No. 8 says: "It is an essential part of this Plan that:

(a) On or before September 19, 1929, the holders of the Trustees' Participation Shares must deposit their Certificates with the Trustees for exchange into the shares of The BancoKentucky Company; and for each Participation Share thus deposited, the Trustees will cause to be issued to the holder thereof, Two (2) shares of the stock of the new corporation. In addition thereto the depositing shareholder"—that means the bank shareholder only—"will have the right to subscribe for as many additional shares of the stock of The BancoKentucky Company as he may desire at the price of Twenty-five (\$25.00) Dollars per share subject to allotment ratably if over-subscribed.

Opening Statement of Mr. Marx

Trustees' Participation Shareholders who fail to deposit their shares on or before September 19, 1929, will be deemed to have waived their rights to thus exchange their shares and subscribe for stock in the new company, unless the Trustees shall extend the time for deposit and subscription (as they may do in their discretion), in which event the Trustees' Participation Shareholders will be deemed to have waived their rights, unless their shares are deposited within the extended time."

Your Honor will see that they preempted the right of subscription to shareholders of the National Bank of Kentucky and the Louisville Trust Company, and nobody else, until September 19th, could get one share of this stock under this plan.

Now, the evidence will also show that when they sought to induce persons to subscribe for stock of this reorganization, this third company that they were adding to the two banks, that they had in mind that one of its advantages was that you would get out of your stock assessment; so we have Richard Bean, the same Richard Bean the facsimile of whose signature is attached to this letter of July 19th, and one of the organizers, writing a letter over his signature to James B. Brown, the other man a facsimile of whose signature is attached to the letter, and President of the National Bank of Kentucky—the heads of the two banks that were setting up the Banco Kentucky Company. This letter is dated July 26th, and reads: "My dear Mr. Brown, before beginning our campaign to get everybody in, I think we will want to send out several letters, because it is utterly impossible for us to handle 1500 people personally.

"I enclose some suggestions, but I have serious doubts about paragraphs 3—6—7."

And well he might have a doubt about including paragraph 7 in any circular broadcast.

Opening Statement of Mr. Marx

"If this general idea appeals to you, please whip it into shape and let me see what it looks like. Very truly yours, Richard Bean, President."

And here is paragraph 7—I might read the beginning; it is on stationery of the Louisville Trust Company and it is addressed "To Our Stockholders:" and says: "Quite a number of our friends are asking questions which doubtless have occurred to others, and we are glad to give this information generally."

"7. Does the 'double liability' apply to BancoKentucky stock as it does to stock in the banks?" Answer: "No; one of the advantages of transferring your bank stock for BancoKentucky Company stock is that you are relieved of the double liability clause which applies under the Kentucky law."

If that had ever been broadcast in that way and had come into the hands of the Federal Government, or if it had been known generally to the depositors of this bank, how it would have shaken, instantaneously, the confidence of those depositors, and yet that was what was in the minds of Mr. Bean and Mr. Brown, as evidenced by this letter. That was in the minds of the stockholders when they bought their stock. As evidence of this, there went out with this letter a so-called subscription, which reads: "Under the Reorganization Plan as outlined in the letter of the Trustees, dated July 19, 1929. To the Trustees of National Bank of Kentucky and The Louisville Trust Company: 1. I hereby deposit with you endorsed in blank and witnessed Trustees' Participation Certificates for an aggregate of Participation Shares of the National Bank of Kentucky and The Louisville Trust Company, in exchange for which you are to cause to be issued to me Two (2) shares of stock of The BancoKentucky Company for each Participation Share herewith deposited, fully paid and non-assessable."

Opening Statement of Mr. Marx

In other words, take my assessable stock and give me back non-assessable bank stock, or an interest in it. Now, I say that it was an interest in bank stock because they said so. He was to get non-assessable shares, not under an outright scheme of sale, but under a reorganization plan, and so he says "cause to be issued to me Two (2) shares of stock of The BancoKentucky Company for each participation share herewith deposited, fully paid and non-assessable, under the terms of the Reorganization Plan as outlined in your letter of July 19, 1929, if, and when and as said Plan shall become effective as therein provided.

"2. In accordance with the privilege given me under said Plan of Reorganization, I hereby subscribe for additional shares of The BancoKentucky Company, at Twenty-five (\$25.00) Dollars per share, and agree to pay the purchase price thereof on call of the Company following date said Plan become effective."

Now, if Your Honor please, there were a lot of people who exchanged—ninety-five per cent of them, so that the BancoKentucky Company got, by the process of exchange, and only by that process, ninety-five per cent of the National Bank of Kentucky. The National Bank of Kentucky was at that time represented by, roughly, 570,000 odd shares of Trustees' Certificates, and in exchange there was issued by Banco 1,140,000 shares of BancoKentucky stock certificates.

Now, "(b) The entire Plan of Reorganization and the deposit and subscription privileges and rights hereinabove set out, are all, and each of them is, conditioned expressly upon the acquisition by the Trustees' Participation Shareholders, either by deposit for exchange, or by direct subscription as above, of at least a majority of the shares of the BancoKentucky Company"—in other words, "this Plan is conditioned on the fact that the bank stockholders will own, operate, control and manage this new company we are

Opening Statement of Mr. Marx

setting up, and if they don't own, operate and control it, there is no plan." It didn't become effective—it is "further conditioned upon the acquisition by the Banco-Kentucky Company of at least a majority of the Trustees' Participation Shares issued and outstanding as of September 19th, 1929."

The second condition was that the new corporation be managed by the shareholders of the National Bank of Kentucky, and this new convenience they were setting up was to be owned by them—they were to own the stock of their bank so they would get the dividends on it. I might cite here that it did have it, and cent for cent the dividends on the stock of the National Bank of Kentucky went into the pockets of the shareholders of the National Bank of Kentucky, in exactly the same sum of money as if they had stood of record as the owners of that bank stock on the stock ledger of the bank. In other words, this split-up two for one and the dividend declared on the Banco-Kentucky Company stock were so devised and arranged that if I was a stockholder and I got \$100 as my dividend on National Bank of Kentucky stock, represented by the Participation Shares, I got \$100 on my Banco-Kentucky stock after I had exchanged it. I have a table here, which we will offer in evidence, which shows that quite clearly.

The Court: You mean they made a distinction among the stockholders of Banco-Kentucky Company between those that had exchanged their Participation Certificates and those that bought theirs in the open market?

Mr. Marx: No, just the opposite: Whether you exchanged or didn't exchange you got exactly the same amount of money in dividends. In other words, my point is that by depositing, exchanging your Trust Certificates for Banco-Kentucky Company stock you did not give up your dividends or one fraction of a penny of your dividends; you kept them.

Opening Statement of Mr. Marx

The Court: What about the man that bought stock on the open market?

Mr. Marx: I would rather deal with that man somewhat separately, because it is our contention that he bought an interest in that stock.

The Court: Was there any distinction made between him and the man who exchanged his Participation Certificates?

Mr. Marx: No.

The Court: Go ahead.

Mr. Marx: Judge Sullivan dealt with that point, if Your Honor please, in an addenda to his Opinion which said that the entire assets of the holding company consisted of Trustees' Participation Certificates, which in turn represented the stock of the National Bank of Kentucky, and its affiliates, and every one dealing in Banco was bound to know what its assets consisted of. They were, then, bound to know that the statutory liability was imposed upon such stock by statute, and that the Court look through the entire involved financial structure and hold the owners of the stock liable for the statutory assessment. Your Honor, if I am pardoned, dealt with the same thing in a somewhat more extended way in your opinion, and fortified your opinion with a citation of authorities, particularly two cases from the United States Circuit Court of Appeals.

We contend that those persons who bought stock in the open market—and they were in the minority—I mean persons who had never owned stock in the National Bank of Kentucky, but just walked in to a broker and bought the stock—knew what it was and that it was bank stock. In the first place, the name “BancoKentucky” challenged their attention that it was bank stock that they were buying.

The Court: My question was not addressed to asking their identity, but I understood you to say there was a table there, and I thought it might be there was something contained in the articles or the by-laws of the corporation

Opening Statement of Mr. Marx

which gave in the nature of a preference to dividends, or something of that kind.

Mr. Marx: No, they didn't; the preferred position that they got, that the bank shareholders got, was the guarantee that they would continue to manage, operate and control the Banco Kentucky Company through the officers, and directors of their bank, and through the ownership of more than a majority of its shares and through the preemption of the Banco stock in their favor before the plan started: So, the bank shareholder started out in a preferred position to that extent, but not as to dividends. Now, the table as to dividends will show that on January 2, 1930 the Banco Kentucky Company received from the National Bank of Kentucky and from the Louisville Trust Company, as dividends, \$224,620, and disbursed as dividends in the same identical amount to its stockholders on the same day. On April 1, 1930 it got \$228,100, and disbursed that amount to its stockholders on the same day; on July 1st it got the same amount and disbursed it to its stockholders on the same day, and on October 1, 1930 the same thing.

The Court: That was the case in every instance where they received stock dividends from the bank? You have read a number of dates: Were they the only dates, or were there others?

Mr. Marx: No, those were the only dates. It was very short lived.

The Court: Those were the only dates on which they received dividends?

Mr. Marx: That is right. Now, then, this letter of July 19th, the organizing letter, says: "9. It is the unanimous recommendation of your Officers, Directors and Trustees of the National Bank of Kentucky and The Louisville Trust Company, that the Trustees' Participation Shareholders immediately deposit their shares under this Reorganization Plan, and that they exercise their right to subscribe

Opening Statement of Mr. Marx

to the additional shares of stock of the BancoKentucky Company."

We shall introduce another letter from Mr. Brown in which he said in reality what the bank shareholders are asked to do is to increase their investment in bank stock.

"10. There is enclosed herewith a subscription form covering this transaction, which you are asked to sign at your earliest opportunity and deposit with the Trustees at their office, 421 West Market Street, together with your Certificate or Certificates for Trustees' Participation Shares, endorsed in blank and witnessed. There will be issued to you an interim receipt for the shares deposited which, when the Plan has become effective as above set forth, may be presented for exchange for the permanent certificates of the BancoKentucky Company, in accordance with the Plan of Reorganization."—you don't get the certificates except as part of the reorganization plan; you don't get them as an outright sale. 0

Now, that plan became effective, as Your Honor knows, and Your Honor also knows that the bank shareholders subscribed some \$9,000,000 as an increase in their investment in bank stock, and they subscribed it with the knowledge and the announcement that it was to be used to buy more bank stock in other banks.

Now, we have a lot of evidence which proves, indelibly, irrefragably and indisputably that the purpose and intent of the stockholders and directors of these banks, and the officers of these banks, was to organize the BancoKentucky Company primarily as a bank holding company; it was not to be organized as a general mercantile corporation, although it was organized under general laws, and although its charter powers gave it the right to own all the stock of all the corporations in the United States. Its purpose was to own bank stock, and that purpose was announced to every agency that inquired. We have here the question-

Opening Statement of Mr. Marx

naire of the Federal Reserve Bank on credit and chain banking: "What is your purpose?", and the answer, "To hold the stocks of banks and trust companies." They wanted to register their stock on the Chicago Stock Exchange, and the Chicago Stock Exchange said "What is your purpose?"; and they said, "To own and hold bank stock."

Now, if your Honor please, the National Bank of Kentucky was forbidden by Federal law to engage in branch banking; it was forbidden to operate a bank outside of the corporate limits where it was domiciled and chartered. There is a sound policy behind that federal law; it was prohibited from going into partnership with a state bank, which is examined under a different supervisory authority, and subject to different laws, because federal banks are a special depository of the Federal Government, for one thing, and it is prohibited from crossing the state lines and to engage in interstate banking. It is prohibited from engaging in trust business, except as specifically licensed. It has to deposit its monies, a certain percentage of them, in the Federal Reserve Bank as a reserve against runs or other emergencies; it is limited specifically by federal law, and that is what has made the strength of the federal banks in this country and given the people confidence in them. These people undertook to avoid the law, and we can prove it by the records, written records. They set out to do a general banking business—they set out to do indirectly what the law forbade them to do directly, to engage in branch banking. They were not content to go into partnership with a state bank in Louisville, but they wanted to have a chain of banks throughout the country and monopolize banking as far as possible, although the Solicitor General of the United States, Mr. Layman, one of the greatest Solicitor Generals this country has ever known, in a written Opinion, which is recorded—and they could have

Opening Statement of Mr. Marx

read it—said that this thing is unlawful, contrary to the public policy of the United States and would inevitably lead to disaster, just as it did lead to disaster. They went ahead anyhow; they went over into Ohio and acquired banks, and towards their dying days they acquired some kind of tenuous interest, which proved to be a will-o'-the-wisp, in a chain of banks in the South.

Now, if Your Honor please, before the \$9,000,000 which was subscribed came in they had already pledged it out; they had already contracted to buy the Brighton Bank at Cincinnati; they had already contracted to buy the Pearl Market Bank in Ohio, and subsequently they bought a bank in Covington, one in Newport, one in Ashland, and so on down the line. They bought those banks by an exchange of their own stock and by disbursing the cash they had, so that in a very short time this company, which was avowedly organized as a bank stock holding corporation, owned nothing but bank stock.

Your Honor may say that it had some independent property. In the way of what? It may amuse Your Honor to learn that so far as it was concerned it was no operating company at all; its office, if it had one, was in a drawer in the desk of the cashier of the National Bank of Kentucky. Its books were kept by employees of the National Bank of Kentucky, and it only had skeleton books, three of them, a Ledger, Cash Journal and memorandum book of stock subscriptions. It only had fourteen transactions. It had officers, but it paid them no salaries, and it had no paid employees. It was a holding company for bank stock. Oh, yes, it owned a few other small things—it owned \$25,000 worth of stock in the Union Central Life Insurance Company, a business forbidden to banks, and my associate, Judge Wood, reminds me that this corporation, this holding company which had no office, no officers on salary, no employees and not even any independent correspondence.

Opening Statement of Mr. Marx

files, was not even qualified to do business in the State of Kentucky. Your Honor knows that there are certain laws in the State of Kentucky which require a foreign corporation desiring to engage in business here to pay a certain tax and to file certain reports and to designate an agent for the service of summons. It did none of those things, and was not qualified to do business here.

Now, they owned a few other insubstantial things, but nothing that proved to be of any real value. Their only operations were to buy these banks and hold their stock, and the evidence will show Your Honor here that in absolute defiance of the law against interlocking directorates and in defiance of the law which requires a director of a national bank to take oath that he owns, in his own name, unqualified, unpledged and unassigned, the absolute ownership of ten shares of stock, this holding company proceeded to stick its nominees in all this chain of banks. Why, those nominees did not even get the dividends on the ten shares of stock that stood in their names, and as fast as a bank declared a dividend the BancoKentucky Company wrote the bank directors around the country to send the dividends in to the BancoKentucky Company. They didn't even hold the certificates; they were put in the files of the National Bank of Kentucky and in the desk of its Cashier.

Why, if Your Honor please, there is a law in the State of Kentucky that forbids a corporation to own—or an individual, I think—more than fifty per cent of the stock of a bank, and yet the BancoKentucky Company proceeded to violate that law with absolute impunity, and to own more than fifty per cent—they owned ninety-five per cent of the National Bank of Kentucky and of the Louisville Trust Company for example—all of which was well known, because it was set forth in this notice that the plan did not go unless that illegal condition came about.

Opening Statement of Mr. Marx

Now, the inevitable results of a bank that was already started downhill—whether solvent or insolvent, it was going downhill in July, 1929 and continued to go downhill during the short year that this bank stock holding company lived—was that within the brief space of one year's time the whole thing folds up. The National Bank of Kentucky fails; the Louisville Trust Company fails; other banks fail, and I might say to Your Honor that before the year's time—in just a few months—this \$9,000,000 subscribed as additional investment in bank stock, which they used to buy more bank stock, was gone, but the holding company was borrowing \$1,600,000 in New York City. So, it not only was stripped of all tangible assets except bank stock, but it was in debt to the Chemical Bank for \$1,600,000, and it pledged as security some of those very bank stocks. It was less than a hollow shell, and so when it busted, or when these banks broke, the very thing that Solicitor General Layman said was bound to happen, the holding company also busted, and its assets were bank stock subject to double liability, so that in a year's time what happened? I have told you all, save and except one thing: In the space of that short year, it is now claimed, the depositors of this bank lost the double liability provided by federal law, and we say that didn't happen.

My partner, Judge Wood, has asked me to call Your Honor's attention to another indisputable, irrefragable, documentary fact, and we expect to show it so overwhelmingly that nobody can deny it: They were going downhill so rapidly at the time of the organization of Banco Kentucky, when they tried to shake off this double liability, that they solemnly passed resolutions to get out of the national banking system, so they could escape from the Federal Reserve Bank and escape from the Federal Bank Examiners and escape from the demands of the Comptroller of

Opening Statement of Mr. Marx

the Currency that they set their house in order, and they went down to Frankfort and paid \$4,000 of the depositors' money to incorporate a state bank called the Bank of Kentucky, and notified the Comptroller of the Currency that they were going into voluntary liquidation, and quit. But, they had obligations to the Federal Reserve Bank, and they could not do business unless their new institution was a member of the Federal Reserve. So, in this very period—the Banco Kentucky Company did not start to function until the 15th of October, 1929—in this very period and at that very time when they wrote the Federal Reserve Bank and asked them if they would admit their new bank, the Federal Reserve Bank had written them and sends a letter, I think to Mr. Vaughan and to the Cashier or Vice-President—I don't know who it went to, some officer of the bank, telling them that we can't quit.

Banco began to function October 15th, and this letter is dated October 22nd, and is in reply to a letter from the bank dated October 15th, apparently a coincidence. It is addressed to Mr. Charles F. Jones, National Bank of Kentucky, Louisville, Kentucky. "Dear Mr. Jones: Your attorney, Mr. Robert F. Vaughan, advises us that another stockholders' meeting was held on October 15, 1929, at which it was voted to make the liquidation of the National Bank of Kentucky effective close of business November 15 instead of October 15. He suggested that we make an examination of the Bank within the extended period so that when the transfers are made to the new State bank it will be immediately admitted to membership without interruption of the rediscounting privilege.

"We prefer to defer the examination until the new State bank has received its charter and has taken over such assets and liabilities of the national bank as it is going to have. This will give the management ample opportunity to correct

Opening Statement of Mr. Marx

the criticisms contained in the last examination of the national bank as of May 25, 1929. In this connection, I attach a list of the sub-standard assets which we feel should not be taken over by the new State bank."—and that attached list of sub-standard assets is here. It says "Sub-standard assets that apparently should be removed from National Bank of Kentucky, Louisville, Kentucky, based on examination of May 25, 1929 by Chief National Bank Examiner," and the amount of those sub-standard assets which they were asked in June, 1929, just a few days before they organized Banco, to take out of the National Bank of Kentucky totaled \$4,023,171.41, and that was more than the entire capital of the National Bank of Kentucky, if Your Honor please. At the very time these men set out to get rid of their stockholders' liability they had been told by the Federal Reserve Bank and the Chief National Bank Examiner that their bank was in such a precarious position that they ought to remove the bad assets and doubtful assets—sub-standard assets, they called them—equal to more than the capital of the bank. No wonder Mr. Bean wrote to Mr. Brown "One of the chief advantages is that you will not be subject to stock assessment if you make the exchange."

The letter goes on: "In the meantime, I suggest that the National Bank of Kentucky make application in behalf of the Bank of Kentucky for membership in the Federal Reserve System if and when the conversion takes place. This could be passed upon by the Federal Reserve Board before November 15, so that if approved there would be no interruption in the membership of the institution.

"I enclose a copy of Form 83a, changed so that application could be made by the National Bank of Kentucky in behalf of the proposed State bank. The resolution embodied therein could be adopted by the Executive Committee pro-

Opening Statement of Mr. Marx

vided it has full powers between Board meetings. The application should be accompanied by a copy of the articles of incorporation of the State bank. When it received its charter a copy of it should also be furnished us.

"Of course, if the application is approved it would be done subject to the conditions contained in Regulation H issued by the Federal Reserve Board, Series of 1928, and also upon condition that certain objectionable assets are not taken over by the new institution and other criticisms corrected. Shortly after the new bank opens for business our examiners would make an examination to see that the conditions have been complied with.

"In case you would like to call to discuss the situation in person, we shall be glad to see you at any time.

Yours very truly,

C. M. Stewart.

Asst. Federal Reserve Agent."

Now, Your Honor may wonder what happened to the solemn resolutions to denationalize or liquidate the National Bank of Kentucky. They postponed it from month to month and week to week and finally, unable to remove \$4,000,000 worth of sub-standard assets, unable because of the weakened condition of their bank and the criticisms, they rescinded the whole set of resolutions, and on November 15th the Board of Directors of this bank decided they could not go on and voted to close the bank and asked the Comptroller of Currency to liquidate it. The next day the Comptroller of the Currency of the United States found the bank insolvent; and there was no change between that night, when they voted to close, and the next morning, when the Comptroller found it insolvent.

Now, one other word about this new money that went into the Banco Kentucky Company by subscription. Appar-

Opening Statement of Mr. Marx

ently the Federal Reserve Board suspected what had happened, because on October 22, 1929 they added a footnote after the \$4,000,000 assets they asked to be removed, as follows: "If there is any undue concentration of loans on stock of the new holding company, corporation in which officers and directors are interested, or any other corporations, same should be reduced to within reasonable limits."

The evidence will show Your Honor that when they set out to organize the Banco Kentucky Company and to begin this campaign that is referred to in the letters between Mr. Bear and Mr. Brown that the banks undertook to make it possible for this money to go into the holding company to buy more bank stock by making loans on the new holding company stock for the full face value of that stock plus the amount added for surplus; in other words, they loaned \$25 on a \$10 par certificate issued at a \$25 price; and they made many loans on the sole security of that stock, so that at the time the National Bank of Kentucky closed, I think the total of loans on Banco stock, or in which Banco was either sole security or a large part of the security, ran somewhere close to \$5,000,000—worthless collateral. And that isn't all; the Louisville Trust Company, the Siamese twin of the National Bank of Kentucky, also made loans totaling \$1,700,000, so that means that the money that the holding company got with which to buy bank stock in Cincinnati, Ohio and Newport and other towns came right out of the National Bank of Kentucky and the Louisville Trust Company, to such an extent, that I think the total loans at one time ran either \$7,000,000 or \$8,000,000 from the two banks—more than the entire capital of both banks was loaned out on Banco stock and transferred from the banks into the holding company. Hence, the warning of the Federal Reserve Board "If there is any undue concentration of loans on the stock of the new holding company, it should be reduced to reasonable limits."

Opening-Statement of Mr. Marx

If I went on I could broaden this, that probably is now already unduly long, but I don't think Your Honor can get this picture unless you hear this evidence in detail, which shows it. I think it should be clear to Your Honor that a holding company for bank stock—the people who own shares of that company own an interest in bank stock; they are the real, substantial or beneficial owners of stock in bank. They get the dividends on the stock in the bank, and when their banks fail they have to respond for their double assessment, and that is true whether they are innocent of any wrongful intent or whether they are guilty of a wrongful intent; the law does not inquire as to your intent when you organize such a company. Broadly stated, although variously expressed, the general ground is that you cannot have the benefits or the profits of bank stock without responding to the liability. You cannot keep the dividends and shake off the liability, and those who are the beneficial owners—what does beneficial mean? Those who get the benefits—they have to respond to the double liability. Another broad ground of liability broadly stated is that you cannot organize a holding corporation for your own bank stock and put that stock in the holding corporation and then shield yourself behind the corporation of your own creation. Now, what Your Honor cannot do as an individual, a thousand people cannot do in the aggregate. If this letter of July 19th had been sent from Tom Jones to Tom Smith, stating "We two fellows are going to organize a company and it is going to own all our bank stock, and we are going to be the Board of Directors; we are going to be the officers," there is not the slightest—there would not be the slightest doubt in Your Honor's mind that they could not shield themselves behind that corporation. That is exactly what one thousand Tom Joneses did here, and the fact that the number of people is large does not make that

Opening Statement of Mr. Marx

without the law; and the fact that the people are prominent does not take them without the law, because in a large institution, although the number of stockholders is large, that number is small alongside the thousands who trust their money to the banks as depositors.

There are numerous cases now—five years ago there weren't so many, but now there are legions of them, which state you cannot organize a holding company of your own creation and then shield yourself behind it. Another broad ground of liability, if the Court please, is that you cannot have a corporation as your own convenience or instrumentality, in which you pull the strings, name the officers, name the directors and dictate their movements, and which you control, just like you would control marionettes—you cannot have a corporation as an instrumentality any more than you can have an individual for your agent and escape liability. What you do through this corporate instrumentality the law says you do yourself, fundamentally. Your Honor, you cannot have a corporation—this is another broad ground of liability—you cannot have a corporation which does by circumvention or by indirection or by subterfuge what you cannot do directly. In other words, the law says that when a bank is prohibited from doing certain things—engaging in chain banking or branch banking or owning insurance company stock or making speculative loans—that bank cannot cause a third corporation to be organized and take itself from without the law and do under that third corporation what it could not do under its own name. When men set out to do by circumvention what they are prohibited from doing directly the law disregards the corporate convenience they set up in order to do those things which would otherwise be unlawful, and holds them to the liabilities that the law generally imposes on them. I think it will develop here that there are additional grounds for holding the stockholders.

Opening Statement of Mr. Marx

If the Court please, Judge Wood has called my attention to the fact that I have not stated what I think, however, is implied in what I have stated: That when you set up a holding corporation of this character, in order that it be lawful, you must assume the liability that goes with that stock, and if you set out to evade it or avoid it by denying the liability, the law deems that no matter how innocent your intention, no matter how good your motive, the law says that that denial of assessment liability is an evasion of the federal statute, and the law says the act is a constructive fraud, and that that fraud is committed even though the men who do it are good men, with honest motives. If the effect of their act is to evade or avoid the law, therefore it will be deemed in law a fraud. The best case on that, I think, is the Metropolitan Holding Company, where they didn't want to assume liability and they organized this holding corporation. They chartered it with express powers to do a manufacturing business in addition to all other business. They transferred their bank stocks to it, because they said, "We don't want to increase our interest in bank stock; let this new holding company do it," and the Court said, "the effect of that is constructively fraudulent; you can't do it."

I want to call Your Honor's attention to Judge Hicks' Opinion in *Barbour v. Thomas*, because that went to the Supreme Court of the United States—particularly the statement of facts. Just as here, there were five independent banks at the outset, in Detroit—here there were three, the Louisville National, the Louisville Trust Company and the National Bank of Kentucky. They organized a holding company, and Judge Hicks says: "1929 was a year of bank consolidations and mergers in Detroit." "In this atmosphere the idea of the formation of the Detroit Bankers Company herein called the 'holding company' was

Opening Statement of Mr. Marx

born. It was nurtured by the soaring market price of the stock of the two older companies and by notions of business expedience." And here these stockholders of the National Bank of Kentucky—their Trustees' Participation Certificates were soaring in the market; their original investment in bank stock had been small but the market price had increased—"It was thought that smaller independent banks were at a disadvantage in competing for the business of large concerns with huge monetary requirements. To continue to exist, these banks had to have business and to obtain it they had to operate as a unit large enough to meet the demands. The organizers were also impressed with the possibilities of more economical control and operation of grouped units through the elimination of duplicating facilities. Certain of their officers and stockholders believed it would be beneficial to organize a corporation under the general corporation law of the state of Michigan to acquire the stock of each of them. Committees were formed, meetings were held and a plan was formulated." And exactly that occurred here. "The purpose of this new corporation was stated in its articles of association as follows"—they are a little shorter than those set out here, but they are broad. "Under the Michigan statute there was nothing per se illegal in the organization of the holding company for such a purpose.

"It was not difficult for the organizing committee, consisting of two representatives from each of the units, to persuade the boards of directors to endorse the project and the stockholders later to acquiesce therein." Exactly what was done here. "The five boards met separately on September 27, 1929, and recommended the plan to the stockholders"—same here. It called for the same capital as here and the proposed dividend rate was set at 17 per cent, or \$3.40 per share, which was slightly in excess of the rate

Opening Statement of Mr. Marx

then paid on an equal value of the bank shares. Here they didn't increase the dividend rate but kept it exactly the same.

"On September 27th and 28th, 1929 the organizers announced through the newspapers that the new group would be one of the strongest institutions in the country, with a capital, surplus, and undivided profits of around \$90,000,000, and resources of over \$725,000,000." The same thing, we will show, happened here; all over Kentucky and the United States, particularly where the stock was sold.

"On October 5, 1929, a joint letter was sent by the officers of the five banks to their stockholders, describing the proposed agreement and recommending the exchange of their stock for that of the holding company, and the signing of the agreement and of a power of attorney to a named committee to put the scheme into effect." Exactly as was done in this case. The Committee was to consist of the directors and President of the bank. "The plan was to become effective," so Judge Hicks says, "as soon as two-thirds in amount of the stock of the united was deposited for exchange." Here the plan was to become effective when a majority was deposited. "More than 97 per cent of the stockholders signed the agreement"—we will show that more than 95 per cent signed, 2 per cent less than in Detroit. "This instrument designated the 'committee' as the agent and attorney of all the stockholders signing it." Here the instrument designated the trustees as agents of the stockholders. "It authorized the committee to organize the holding company for the initial purpose of acquiring the shares of the five several banks." We will show the purpose here to acquire the shares of the Louisville Trust Company, the National Bank of Kentucky, the Pearl Market Bank and two banks across the river—there were six banks, instead of five, here. It provided that the trustees' shares

Opening Statement of Mr. Marx

which they had here should not participate in the dividends, and these six trustees did not participate personally in getting any dividend. It provided that only persons holding trustees' shares should be elected directors, and upon the removal of a director or his death, his shares should be surrendered and his successor elected from the unit company which he represented. This was subsequently modified to permit an increase in the directors. We will show that although the Louisville plan was, in its mechanics, slightly different, in substance it was the same as the plan in Detroit with reference to directors.

Then it says: "During its existence the holding company, as authorized by its charter, exchanged its stock for the stock of other banks in and around Detroit and thereafter many of these banks were consolidated with others of the group. Because of its position as the sole stockholder of record of these many institutions, the holding company prior to each annual meeting listed the persons it wished elected to the various boards." And here the BancoKentucky Company told the trustees who it wanted elected as directors. "There was never any doubt that the holding company's slate would be elected. The holding company would issue to newly elected directors qualifying shares of stock but by an agreement with the directors these shares remained the property of the holding company upon which it received dividends." And to a large extent that precise plan was followed by the BancoKentucky Company.

The dividends on the holding company stock were paid out of dividends received from the bank, and "to meet them the directors of the holding company would suggest to the various units the amount each would be expected to pay and with that exception these recommendations were followed by the directors of the individual units, some of whom were always holding company directors." That was

Opening Statement of Mr. Marx

not necessary here; the Board of Directors of the Banco-Kentucky Company was the Board of Directors of the bank.

They just told the bank how much money they were to be allowed for expenses each month, and supervised them in other ways. The holding company bought an interest in other banks for \$7,200,000, and then the holding company borrowed money in New York to liquidate this indebtedness and made repayments from dividends received from the bank, just like this holding company paid out its money to buy banks and borrowed money in New York on those bank stocks.

"Since the holding company had no substantial assets except the stock of its units, it was manifest that the creditors and depositors of the component banks were afforded no real protection either under the federal statute providing for double liability of shareholders or under a statute of the state of Michigan with similar provisions. This was a matter of vital importance not only to the holding company and the banks, but to the public." So, in Detroit they would not let them function in this way until they assumed such double liability, but Delaware had no such restrictions and had no Attorney General who inquired into it. He didn't notify the State of Kentucky and he didn't require it to put on the certificates that you will pay your proportion of the double liability.

The Receiver of that bank, it recites here that the assessment was levied on the shares of stock of the First National Bank, of which the holding company was the record owner, but the holding company, just like this holding company, when its biggest unit failed—public confidence was gone and the holding company was busted and could not pay the double assessment, because it had no assets—no substantial assets independent of bank stock out of which to pay it. It is quite different when the United States Steel Company

Opening Statement of Mr. Marx

buys a few shares of bank stock; it has millions of dollars of assets with which to respond to a double assessment, and its principal business is not that of a holding company of bank stock.

Receiver Thomas announced his intention of collecting about \$14 a share from the shareholders of the holding company. Each share represented the ownership of .14055 shares of the First National Bank-Detroit stock. Here the assessment is only \$2 something per share.

Then he states here—it is very interesting, and I would like to challenge Your Honor's attention to it—the defenses there—they are too long to read now, but Your Honor will find the defenses set up in Detroit are very similar to the defenses set up in numerous answers here. In Detroit the Comptroller of the Currency himself closed the bank after the Detroit bank holiday. Of course, here the Board of Directors of this bank closed it themselves. They set up there that the Comptroller of the Currency made the bank insolvent. The Court struck them all out; they were not defenses to a stock assessment. It was urged that this was error. Judge Hicks says: "We cannot yield to this insistence. These averments and the evidence offered to sustain them could not have been put in issue here. They constitute a purely collateral attack upon the action of the Comptroller (not a party litigant) in declaring the bank insolvent, and upon his judgment as to the necessity for the assessments and the amount thereof. His determination of these matters was conclusive." And then he cites a long list of cases.

Now, I want to point out in this case that the Comptroller of the Currency is not a party to this case. The Receiver, under the federal law, is the officer of the United States and represents, in this action, the Government in its endeavor to recoup for the depositors their losses, and in

Opening Statement of Mr. Marx

this action there can be no attack of any kind on the order of the Comptroller of the Currency. If he were himself a party his action could be directly attacked, on the ground that he was guilty of fraud in levying the assessment, let's say, if that is the charge, or that his finding of insolvency was a fraudulent finding. But, he is not a party and no such attack has ever been made upon him here or any other place, and in this action, in which an officer of the United States is enforcing the federal law, there can be no collateral attack on the Comptroller of the Currency. Therefore, we have refused to admit that this bank was not insolvent, as they have requested, because in an action between the depositors and the shareholders that issue is foreclosed, and we shall contend, at the proper time and place, that Your Honor would be in error receiving any evidence contradicting that ruling.

"Appellants concede the widely adjudicated immunity of the Comptroller from collateral attack on the wisdom of his determination of insolvency, etc., but their argument is that the statute (section 191 supra) should have no application where insolvency was caused by unwarranted interference and control of governmental agencies and where the circumstances were so extraordinary as not to have been anticipated.

"We are not in accord with appellants' contention."

It says here that the liability of the stockholder of the National Bank of Kentucky does not depend upon judicial determination "whether the banking holidays were well advised, whether the conservator discreetly managed the assets, or whether crucial and unforeseen circumstances led to insolvency. His obligation is fixed by statute. When he subscribes for his stock he agrees to be 'responsible for all contracts, debts and engagements of association, each to the amount of his stock therein, at the par value thereof, in

Opening Statement of Mr. Marx

addition to the amount invested in such stock.' Upon the insolvency of the bank he agrees to discharge his obligation in such amounts and in such manner as shall be determined by the Comptroller. The statute admits of no exception and we can make none. Creditors and depositors have a right to expect that it will be observed and complied with as it is written.

"The Congress probably did not foresee the cataclysmic conditions existing in and around Detroit in the early part of 1929, but we see no logic in, nor necessity for, abrogating the statute simply because the circumstances were unusual. On the other hand, it seems to us that the more unparalleled the situation, the greater the need for depositors' protection."

Now, then, they say all this as "proceeded upon the assumption that appellants were stockholders of the bank. They insist that they were not, that they had exchanged their certificates for those of the holding company, the stockholder of record. Ninety-one and three-tenths per cent of appellants were signers of the 'Agreement and Power' and owners of their holding company stock by original exchange, one-half of one per cent obtained their stock in exchange for the stock of others of subsequently acquired institutions. The remainder obtained their certificates in other ways." The other ways, if Your Honor please, was purchased in the open market. The Detroit Bankers Company stock was freely traded in up to the day it closed in 1933; this institution here only lived a year, and the one in Detroit lived three years.

Then Judge Hicks says: "But the Statute does not restrict liability for assessments to stockholders of record or to those holding certificates. Congress wisely declined to limit the term 'stockholders.' It recognized that bank

Opening Statement of Mr. Marx

stock is capable of ownership without any certificate therefor having been either issued, recorded, or delivered; and, further, that stock might be owned by one person and the certificate registered in the name of another. It has been uniformly and wisely held that the actual owners of the capital of a national bank, that is, those who have their money invested therein, are 'shareholders' and liable to assessment."

The evidence will show that the only persons who invested money in the stock of the National Bank of Kentucky are the people we are suing in this case; there is nobody else. The Banco Kentucky Corporation—the holding corporation—never invested a single, solitary cent in the National Bank of Kentucky. The test is "Who invested their money in the national bank stock?" "The law fixes the obligation upon those who profit from the confidence of the depositors and from the use of their money."

The Court: You are pretty far afield along that line. Let's conclude your statement, Judge.

Mr. Marx: I want to show Your Honor the applicability—

The Court: I understand, you are trying to parallel that case to this one, but I think some of those questions might be raised on questions of evidence.

Mr. Marx: Well, I think Your Honor is undoubtedly correct about that, but Your Honor suggested something that caused me to go into this. That was the fact that Your Honor thought perhaps the evidence ought to be circumscribed, and I just wanted to point out that the evidence we are going to offer will follow the evidence that we did offer and that the Court held applicable in the Barbour v. Thomas case.

Opening Statement of Mr. Allen P. Dodd

**OPENING STATEMENT OF MR. ALLEN P. DODD, ON
BEHALF OF DEFENDANTS**

If the Court please, I shall undertake to confine myself to the issues that we are called upon to try, an outline of the facts, and the position of counsel for defendants to those facts, in order that Your Honor may have in advance the position of the defendant. The basis for this lawsuit is a statute. In other words, there would be no lawsuit here against the stockholders, whatever company they held stock in, unless there was a statutory right for a double assessment, and in order, therefore, that we may clearly define the issue at the outset, I want to read the statute, as it presents the issue as I see it. I think it well to get back to fundamental principles at the start. "The stockholders of every national banking association shall be held individually responsible for all contracts, debts and engagements of such association, each to the amount of his stock therein at the par value thereof in addition to the amount invested in such stock. The stockholders in any national bank who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer." The statute then proceeds further, but I don't think it material to the issue.

In applying that statute to this case and applying the facts, even as conceded by our opponents, all of this stock—and, by the way, we are talking about National Bank of Kentucky stock—all of it was transferred by all of these defendants more than a year before the National Bank of Kentucky failed, and therefore, if the plaintiff is entitled to recover it comes under the second provision, and that is, if they sold this stock or transferred it with knowledge of impending failure.

Opening Statement of Mr. Allen P. Dodd

Now, what are the major issues you are called on to decide? First, did these stockholders have knowledge of the impending failure of the National Bank of Kentucky—that is secondary—primarily “Was the National Bank of Kentucky insolvent and was its failure impending at the time they transferred their stock?” In other words, the insolvency of the bank. Now, the second proposition presented by the bill is: Did they sell their stock or transfer it to the BancoKentucky Company for the purpose of avoiding double liability—knowing its failure, did they transfer to avoid double liability? Now, third: Was the BancoKentucky Company as organized a bona fide corporation, capable of accepting the transfer, and did it accept the transfer of this stock at the time our opponents speak of?

Now, those are the three things you are called on to decide, and the burden is on the plaintiff to establish those three fundamental facts.

[Now comes the proposition of inquiring as to who are the parties here—let’s discuss that just a moment: Who are the parties to this lawsuit? There are some 3,200 of them here sued in this jurisdiction as stockholders of the BancoKentucky Company, and various suits are filed in every jurisdiction in this immediate locality against stockholders of the BancoKentucky Company. Now, those are the parties and those are the issues that you are going to be called on to decide. Now, let’s trace, as briefly as we can, without any opinion of myself as to the effect of any facts that I may state, or any argument as to the position of the people who were acting parties at the time—trace this situation from—I will accept the date of opposing counsel—the making of the Trustees’ Agreement, if you please, April 22, 1927, down to the BancoKentucky Company or its formation first.

Now, this Trust Agreement of April 22, 1927, was entered into between the stockholders of the Louisville Trust

Opening Statement of Mr. Allen P. Dodd

Company and of the National Bank of Kentucky. Ultimately all of the stockholders of the National Bank of Kentucky deposited their stock under that Trust Agreement, and all of the stock of the Louisville Trust Company, except five shares, was deposited under that agreement. Now, that agreement, as the facts will show, was entered into and before it was completed, was submitted to the Federal Reserve Bank in St. Louis, and to the Comptroller's Office at Washington, and all of its terms were looked into and approved by everyone that came in contact with this proposition, on the proposition as to whether or not any director qualifying, in the light of that agreement, was violating the interlocking directorate provision of the United States statute, and the Federal Reserve System at St. Louis and the Comptroller's Office at Washington approved it.

Now, then, not only that, but the National Bank of Kentucky at the time of this unification had a capital stock of \$2,500,000 and the Louisville Trust Company had a capital stock of \$1,000,000. The unification was on the basis of three things: Asset value of the stock; earning capacity of the stock; and dividends to be paid. The stockholders, represented by the directors at the time, never left it to their own judgment as to the asset value of the banks at that time; Humphrey Robinson of this city had been a clearing house examiner for years, so the asset value of the two banks was fixed by him; he fixed that asset value at \$7,289,316 for the Bank of Kentucky, and of the Louisville Trust Company it was approximately \$1,800,000. Therefore, the asset value of the Bank of Kentucky was four times that of the Louisville Trust Company. It became necessary, in order to work out the agreement, that the capital stock of the National Bank of Kentucky be increased to four times that of the Louisville Trust Company. It had a capital of \$2,500,000 and a surplus of

Opening Statement of Mr. Allen P. Dodd

\$2,500,000 and undivided profits of over \$1,000,000. Of course, it had to get the Comptroller's consent; that was submitted to the Comptroller and a dividend was declared, by consent of the Comptroller, of sixty per cent, making its capital \$4,000,000, and the Louisville Trust Company's capital of \$1,000,000, making a total of \$5,000,000 of capital that went into this trust estate, and the trustees authorized the issue of Trustees' Participating Receipts, 50,000 shares.

Now, let's devote a moment to the position of the directors. Under the terms of this Trust Agreement there was approved by these different agencies whose duty it was to supervise it—under the terms of that agreement a stockholder signing and depositing his stock automatically transferred his stock to the trustees. A director had the right to have the trustees, under the terms of the instrument, to, in lieu of his stock deposited issued to him, out of his own stock, if you please, ten qualifying shares. That was under the terms of the Trust Agreement, so that his ten qualifying shares that belonged to him would be free and clear and meet all the terms of the statute as to the ownership of qualifying shares of a bank. The facts will show that Judge Alexander Humphrey and Mr. Kennedy Helm drew that Trust Agreement. Judge Humphrey—one of the last things of his lifetime was to carefully provide that the stock that went to the directors to qualify them in these two institutions remained free and clear from any claims of any sort, and that that condition continued, it isn't worth while to refer to it again, down to the close of the bank. The dividends were paid direct to them down to the close of the bank, and they responded in double liability later on.

These trustees received dividends of the banks and distributed them to the holders of the Trustees' Participation Shares. They were under the supervision of an Advisory Committee made up of the directors of these two banks.

Opening Statement of Mr. Allen P. Dodd

In order that you may fully understand the work of that committee, I will give you my own personal experience there on that Board. I had twenty shares of stock of the Louisville Trust Company. I deposited that twenty shares of stock with the trustees and they immediately issued back to me ten shares of stock of the Louisville Trust Company and ten shares of stock of the National Bank of Kentucky. In order that that stock might continue to be free, and in order that the man depositing, like myself, would continue to adhere to the terms of that Trust Agreement, it was provided that if I resigned or if I died or if my stock was attached, it was provided that that stock would go back to the trustees and participating shares would go to the estate, or to me, if I resigned, or to my creditors if it were attached. In other words, it was free stock. That stock was kept in a box in the Louisville Trust Building in the names of the directors and under their control.

Now, let's take the Trust Agreement down to the next step: Under the original agreement, the Bank of Kentucky contributed to the trust estate eighty per cent, or \$4,000,000 capital, and the Louisville Trust Company twenty per cent, or \$1,000,000 capital. In January, 1929, the Louisville National Bank & Trust Company, another very old institution of this city, came into the group. It was merged into the Louisville Trust Company by the Louisville Trust Company increasing its capital from \$1,000,000 to \$1,750,000. The independent group owning \$750,000 worth of the stock of the Louisville National Bank & Trust Company unanimously approved the merger and surrendered the charter the comptroller had issued to it. That brought the trust estate up to \$5,750,000, lacking five shares of the Louisville Trust Company stock.

Now, again, the Louisville National Bank & Trust Company was a national bank, and its directors, also, of course,

Opening Statement of Mr. Allen P. Dodd

had submitted again to the Comptroller's Office the plan of denationalization and its entry into this group. I want to call Your Honor's attention again that when the Louisville Trust Company, which was not a national bank, sent its representatives to the Comptroller's Office along with the representatives of the National Bank of Kentucky to the Comptroller of the Currency—those representatives of the Louisville Trust Company being Judge Stites and Kennedy Helm, the Comptroller of the Currency took time to congratulate this group for its affiliation with this splendid bank, the National Bank of Kentucky, and again, in 1929, just a little over a year before the closing of the bank, the same Comptroller's Office through its representative, took occasion—there was no necessity for it, for approving what had already been done—to congratulate Mr. Bean for the splendid affiliation of this splendid group, the Louisville Trust Company and this splendid National Bank.

The trust estate was \$5,750,000. Shortly after that it was conceived, and by agreement the par value of the stock—the stock at that time was \$100 par—they reduced the par to \$10. They reduced it to \$10, so the trust estate, represented by the Trustees' Participating Certificates, was authorized to issue 575,000 shares of \$10 each. In February and March and April of 1929 the Banco Kentucky Company was discussed—the formation of the company, to do and perform certain things that have been gone into. I want to tell Your Honor the facts as they occurred at the time. A man's conduct should be governed by his conduct then, his intentions, as it appears then, and the proof that will come on this witness stand will so advise you.

The Bank of Kentucky and the Louisville Trust Company, as they then existed, believed, and I mean by that their directors, that there was a field in the Ohio Valley for the underwriting of securities. The investment banking

Opening Statement of Mr. Allen P. Dodd

business had grown from 1920 through the prosperity of this country to 1929 to where every banking institution had some kind of affiliates to accompany it, the affiliates engaging in perfectly legitimate business of buying and selling bonds, but no company in this community was going into the business of underwriting securities. To illustrate it briefly, here was the bridge out here, with bridge bonds of \$5,000,000 issued just before this, and underwritten by a concern in Cleveland that made a huge underwriter's profit, and the Gas Company and electric companies and various industries who were depositors of the National Bank of Kentucky, some of whom were represented on the Board and found it difficult, due to their requirements, to get sufficient capital to carry on their business. The directors thought that this company could possibly do that. The business of selling first mortgage bonds in this community had not at that time, and was not believed to be even touched. The National Bank of Kentucky was the depository of some 300 country banks, and its depositors were asking for first mortgage bonds, and it could not supply the bonds. The Louisville Trust Company was issuing first mortgage bonds, but it could not supply the market. Both institutions were coming across many people's orders for thousands and thousands of different bonds. It was conceived by the Directors at the Bank of Kentucky that this company could originate mortgages, and that there were large profits to be made by it. It was conceived also that title insurance was a business that was profitable at the time, and that this company could go into that field, and that went so far that Mr. Hugh Fleece who was President of the Bankers Trust Company at that time, gave up his position in order to take a position with the BancoKentucky Company in order to form and work out plans during the organization of BancoKentucky to make a set-up that it

Opening Statement of Mr. Allen P. Dodd

might get into the business. In this effort to get an avenue for business for profit that neither bank could do, the Banco-Kentucky Company could furnish that business. It would be interested in or have banks in Ohio. It could place business along that line. It was an underwriter. It could place the business of first mortgage bonds that was well developed at the time. None of that could be done by the banks.

Thus, negotiations started in February, March, April, May and June, and every feature of that business was argued out by the directors in its meetings immediately after the business of the bank of Kentucky was attended to. That was a company, an affiliate of these companies to be formed to meet this competition referred to by Judge Hicks as the prevalent competition that was confronting these two institutions at this time from the East, New York, Chicago. It was a question of meeting that to survive, to meet and conquer and get a part of that business, to exist. Of course, these matters were discussed by the members of the Board of Directors of the National Bank of Kentucky. The Banco-Kentucky Company was to furnish a service that neither of these two banks could furnish; it was to originate bonds and underwrite them—I am telling you the facts. It came up finally after the Board of Directors of the Bank of Kentucky came to the conclusion in June that the prospective company and the business it would perform would be helpful to the bank. They passed a resolution and placed it on the minutes, and Mr. Brown was authorized to go ahead. Now, the capital structure they had in mind—and there wasn't a thing done that wasn't thought out over weeks of time—was 2,000,000 shares with a par value of \$10 and paid in value of \$25, or a total capital structure of \$50,000,000. It was conceived by the directors that they would get in exchange for Banco-Kentucky stock at least a majority of the Trustees' Par-

Opening Statement of Mr. Allen P. Dodd

ticipating Receipts of \$10 each, and that was the condition upon which the projection of this company was made dependent, and they set aside—the plan was to set aside to make the exchange 750,000 shares of Banco Kentucky Company for not less than 350,000 shares of Trustees' Participation Certificates. I am telling you what actually happened. That would dispose of 700,000 shares of their stock with the control of the National Bank of Kentucky and the Louisville Trust Company. Then, they would have 1,300,000 shares for sale, and I want you to bear those figures in mind, that when this company was launched, fully launched, according to the plans, it would have control of these two institutions and more than \$30,000,000 of backlog. I want to say to you that but for that backlog of \$30,000,000 this company would never have been formed or proposed. The July 19th letter—take its terms, and all of them comply with the schedule of what had been discussed throughout these meetings. It was sent out to the Trustees' Participation Receiptholders and September 19th was fixed as the last day for the deposit of subscriptions. On September 20th, 1929, a meeting of the directors of the National Bank of Kentucky—the Banco Kentucky Company, was held.

Now, let's go back: Much was said about the organization of Banco and the procuring of the charter by counsel for plaintiff. That charter was written and carried by Mr. Carroll, who happened to be in New York—happened to be going to New York on his vacation—he went to Dover and filed the charter and got a certified copy of it and mailed it back to Mr. C. F. Jones, one of the Trusted Officers of the Bank of Kentucky, and one of the officers to be in this company. They said the charter failed to comply with Section 571 of the Kentucky Statutes. Mr. Carroll wrote out a statement to be filed with the Secretary of State, had it prepared and sent it to Mr. Jones with directions that it be filed, and to pay \$1 at Frankfort, but that wasn't done.

Opening Statement of Mr. Allen P. Dodd

Another matter that was not done before the September 20th meeting, I should have stated—September 19th being the closing date: The Commonwealth of Kentucky had, since at least prior to 1849, owned stock in the National Bank of Kentucky. In 1927 it exchanged that stock for the Trustees' Participation Receipts, and as I remember had 760 shares of the Trustees' Participation Receipts with a par value of \$100. It further exchanged those Participation Receipts for the \$10 par shares, and it got this notice; the July, 1929, letter came to it, and Mr. Carroll, Mr. Bean and Mr. Helm went before the Board of Education for the State of Kentucky and there met Judge Cammack in that Board and the whole plan was explained to them, as the testimony will show, and the chief law enforcing agency of the State of Kentucky was present and approved the plan, so far as he could approve. The only reason why that stock was not exchanged for Banco was because the Attorney-General conceived it, under 184 and 185 of the Statutes, necessary to have an enabling act to exchange that. Mr. Helm will be on the witness stand and will tell you about that and will give you the reaction of the Attorney-General about that.

In other words, I want to call your attention to the fact that from the time Banco was conceived and the letter was sent out down to September 20th and afterwards too, and I am pointing your attention to that now, publicity of every kind and character was given to every step. The letter was published. There have been introduced as exhibits here paper after paper showing the outline of this; they are in the record.

Now, September 20th was an important meeting for the Banco Kentucky Company. The moment it was organized it had a Board of Directors meeting and the minutes were recorded. The reason it did not meet September 19th, 1929, was because September 19th was the closing date for

Opening Statement of Mr. Allen P. Dodd

subscriptions. That meeting had a report from its President, Mr. James B. Brown—its Secretary, Mr. Tom ZurSchmiede, and instead of having deposited for exchange a majority of the Trustees' Participation Receipts there were 520,000 shares of 575,000 Trustees' Participation Receipts Deposited, and it was reported at that meeting by those officers that 600,000 shares had been subscribed for at \$25 a share, and in view of the fact that so many Trustees' Participation Receipts were deposited, and there was a great indication that more wanted to exchange, they set aside 1,150,000 shares, and adding 600,000 to that made it 1,750,000, and they only had 250,000 shares left, and asked for authority to sell them through an underwriting company. Now, what else did Banco Kentucky Company do? It made a call for subscriptions and listed the stock on the Chicago Exchange and Louisville Exchange, because it was organized and a company on its way from September 20th. Mr. ZurSchmiede listed the stock on the Chicago Exchange under the resolution of the Board. Mr. Brown, the President of that company, after reciting the facts with reference to the subscription said to them, "Our plan can't go through with this limitation; too much of this stock has been taken up in the exchange and we must have more stock to have the backlog of \$30,000,000." A plan was set in motion—discussed very quickly and set in motion to increase that capital from 2,000,000 shares to 5,000,000. What became of those directors at that meeting? Those directors had reason to believe and did believe—I was one of them—that that company would have 21,250,000 in cash as quick as the subscriptions were collected.

Now, loans on Banco stock: There hasn't been a syllable of proof ever produced from any responsible source that the Directors of the Louisville Trust Company or of the National Bank of Kentucky ever made the proposition or

Opening Statement of Mr. Allen P. Dodd

ever did loan the face amount of BancoKentucky stock on the security of BancoKentucky stock alone. They made many loans for the exact purchase price of the stock, and I want to stop there a moment and call your attention to some other issues of the law. They have proposed to file here a list of loans on Banco by the Bank of Kentucky, and a list of loans on Banco by the Louisville Trust Company. That same thing was made an issue in the suit against the Bank Directors, on the same ground, and after weeks and weeks of trial—and that is one of the points I believe Your Honor can shorten this case—the Master found—what did he find? On the original hearing Judge Dennison, designated by the Circuit Court of Appeals—and this is a fact in that record—as to the Banco loans, made the ruling that the solvency of the maker plus the collateral was a basis for holding the directors not liable. Judge Sandidge held the loans on Banco stock were legal. Judge Sandidge, the Master Commissioner, held that these loans were all legal on the contention and on the issue raised, that the loaning of money on Banco stock was loaning money on Bank of Kentucky stock, the same issue that we have got here, and therefore, violative of another section of the United States Statutes. That case reached the Circuit Court of Appeals and Judge Simons delivered the opinion, and he sustained the Master on that issue and that opinion stands now. I will read it before I get through—

The Court: Do you mean in the Directors' suit?

Mr. Dodd: Yes.

The Court: The same case that went to the Supreme Court?

Mr. Dodd: It went to the Supreme Court on a question of negligence, not violation of statutes.

The Court: It was sent back to determine the question of common law negligence.

Opening Statement of Mr. Allen P. Dodd.

Mr. Dodd: That is right.

The Court: Was it in there that they sent it back on that point?

Mr. Dodd: Yes.

The Court: Is that a final determination?

Mr. Dodd: I am satisfied it is. I was present when the argument was made in the Circuit Court of Appeals on the rehearing for negligence, and the attorneys for the Receiver—they were shut off at once on the ground that they were hearing another matter. That opinion stands; it is a further inquiry into the question of negligence that the Court is engaged in now, and that finding, however, concurred in by the Circuit Court of Appeals, now stands. I have got a reference here to show it.

Mr. Marx: I don't want to interrupt, but I don't think that is a correct statement; the Supreme Court reversed the appeal and has granted certiorari in the case and has taken jurisdiction. They have only sent that other back on the ground of common law negligence.

The Court: I have gained the impression that they stated they would not take only part of the case.

Mr. Dodd: They reversed it.

The Court: When it goes to the Supreme Court, after the questions now before the Circuit Court of Appeals are decided, it will then have all questions before it.

Mr. Dodd: There will have to be another petition. I will read it—I have it right here: "October 18, 1937. The Court is of the opinion that the Circuit Court of Appeals was in error in ruling that, in the absence of a cross appeal, the question of whether common law liability for negligence would support the decree was not before the court for review. The decree of the Circuit Court of Appeals is reversed and the cause is remanded to that court for the determination of that question."

Opening Statement of Mr. Allen P. Dodd

The Court: Then it will go back to the Supreme Court for determination of all questions.

Mr. Dodd: When another certiorari is granted.

The Court: It doesn't automatically go back?

Mr. Dodd: No; that is the point I make.

Now, following September 19th a call was made for the payment of stock subscriptions and there will come before Your Honor the total amount of stock subscribed, the total number of stockholders at that time. In fact, on the first day of October following there were 2,446 people that owned Trustees' Participating Receipts of the Louisville Trust Company—National Bank of Kentucky as it then existed. When you go to count the large number of names and undertake to add them up—I have a list of them here—and ascertaining the exact number of shareholders, you find yourself differing with other people, adding up two shares here and a few there, so in order that Your Honor might know exactly how many shareholders the BancoKentucky Company had after the subscription, we undertook to trace it as best we could, and that was to get the dividend record of the BancoKentucky Company, of dividends it had paid, and the nearest date was January 1, 1930, which was three months after this corporation was organized. On that date there were 5,670 shareholders of the BancoKentucky Company. In other words, there were investors of some character that came into this organization and paying for this stock to the number of 3,226.

Now, let's trace some of the buyers of that stock—in volume only, based upon these figures on the adding machine. We are going to trace the fraud or motives, and let's take the directors first. Mr. Marx said, very correctly, that he is not interested in that case, that he is suing the stockholders and not the directors. The directors of this corporation owned, at the time of the transfer of stock, which

Opening Statement of Mr. Allen P. Dodd

was October 1, 1929, 71,757.5 shares with a par value of \$717,575. They exchanged this 71,000 shares for 142,000 shares of Banco stock. Now, they went out on the market and bought 53,920 shares for which they paid \$1,348,000. There was a double liability on all the Trustees' Participating Receipts they owned of \$717,000. If they were undertaking to avoid—the point I am making is that they put up \$1,348,000 in order to avoid a total double liability of \$717,515. If Your Honor please, I want now to become the candidate for the prize boob of the whole lot, if I was trying to evade something or other in that group, and I am talking from experience. I didn't deposit—and many others didn't—I didn't deposit a share for exchange; I only had 20 shares, as my qualifying shares, and I bought and paid for \$20,000 worth at \$25 a share. I never exchanged a share. January 1st, when I went off the Board of Directors of the National Bank of Kentucky, then I got 10 shares of Trustees' Participating Receipts, of which I transferred five of them and exchanged five and got one hundred shares of Banco Kentucky, and I show up on the record with 900 shares. In other words, I put up \$20,000 to avoid a thousand, because I had my other and I had to pay for that when the banks closed.

Let's go one step farther. Of course, the double liability the directors had at that time was \$717,000 on both banks. We are talking about the Bank of Kentucky, and as he has told you 70 per cent of that was on the Bank of Kentucky. Seventy per cent of that is \$502,000—I don't guarantee these figures, because I added them up, but they are not very far from right. \$502,300 was what we were trying to avoid and we put up \$1,348,000. Take the whole group together, and my addition in figures—and by the way, if Your Honor please, I want to warn you of this fact, that when they bring their auditors in here with their sharpened

Opening Statement of Mr. Allen P. Dodd

pencils they will disagree; they will disagree with me and with each other, but this is approximately right. The Trustees' Participation Receipt holders altogether, bank directors and all, bought and paid for 191,100 shares of this stock, and put up \$4,777,500 for it. Now, the double liability of the Bank of Kentucky altogether was only \$4,000,000.

Now, then, when it came down to count up for this statement of January 1st, this period ending December 31st, it turned out that instead of 600,000 shares being purchased, as reported, for cash, by Mr. Brown, there was actually purchased for cash 394,000 shares at a total price—the Banco Kentucky Company got the money—of \$9,862,000, a little less than \$10,000,000. Of that, over 200,000 shares were paid for by people who never had a share of stock of the National Bank of Kentucky or Louisville Trust Company, or of the Trustees' Participating Receipts.

The Court: How much was it?

Mr. Dodd: Over 200,000 shares, at \$25 a share. Now, there was \$9,862,000 paid in in cash as subscriptions. The Trustees' Participating Receipt holders put up \$4,000,000. Deduct that and you have got \$5,000,000 put up by the man in the street, people here and yonder; clerks and people in every walk of life who had absolutely nothing to do with the bank or the trust company, and their only participation in this company was buying stock and paying cash for it at \$25 a share.

Now, let's go along with Banco: One of the two greatest investment houses in the country, the minutes of September 26 show—it is recorded there that it had come in and bought at \$25 a share 250,000 shares. It turned out afterwards they had not bought it, but it was so reported and the minutes show it. These stockholders had already bought it.

Opening Statement of Mr. Allen P. Dodd

As a part of the plan, the Banco Kentucky Company—we might as well get those facts in now—part of the plan of this group was to denationalize the Bank of Kentucky. The reason for that, as the facts will show, the National Bank of Kentucky at that time being a National Bank and a member of the Federal Reserve System, had what it called a Transit Department, in which it gave twenty-four hour service to its depositors—which handling of money in volume, and for a number of years it had made twenty-five to thirty-five or forty thousand dollars a year out of the Transit Department. The value of the volume of money in collected credit—in other words, if the Bank of Shelbyville sent in \$25,000 to be deposited in the five o'clock mail, and a check to go to Chicago. The check was mailed and the money went to the credit of the Bank of Shelbyville. It was the thought that this group would have \$30,000,000 and would then organize its own reserve, that it could make its own deposit with its own reserve. To do that it had to be a state bank; they could not be in the National System without being part of the Federal Reserve. Investment in the stock of the Reserve was thought to be a poor investment; it was idle money and had no earning capacity. The figures before the directors showed that the bank could realize, on the present reserves, \$250,000 to \$300,000 in profits that we were losing. The general situation shows that banks were going out of the national Federal Reserve System at that time. Thus, conditions were reasons for denationalizing. I signed it—I was one of the people who signed the agreement to denationalize. But for the lack of capital they thought it was necessary to have—they conceived the idea of increasing the capital, because of reports coming in that there were a number of underwriters who were anxious to underwrite every share of this stock that was not taken on the first subscription. Notice was sent

Opening Statement of Mr. Allen P. Dodd

out September 15th, giving October 15th as the date of liquidation of the National Bank of Kentucky, and steps were taken to denationalize it. You see, I was one of those trustees that had bought that stock and that had signed the agreement to denationalize. Here are the facts about it. They came to me and to the other trustees down there at the bank and told us they wanted to extend the time thirty days, due to unpreparedness at that time, and it was done, extended to November 15th. I don't think Judge Marx ever heard that there was a stock market crash; he didn't mention it. I don't think I have to go into a dissertation and tell Your Honor that there was a crash on October 24, 1935, and I don't have to dissertate about the ability to float new issues of stock following that crash. I think it was Judge Dawson who said out here—it may have been someone else—that the stock market crash of October 24, 1929, was worse than a fire and flood to investments. We know that values before and values after were two different propositions, and the failure to carry this plan through promptly was due entirely to that stock market crash. After that every bank was taking to cover, to protect its loans and collateral. Banco stock was listed on the market. It had gone to 32, showing the public response, and it receded to 24, hovering from 24 to 20 in January. It went back up in January and by March it was 25. That is the history of the stock.

Now, let's come down to the statement of Banco—I believe the statement got out that time by an officer of that company. I called Your Honor's attention to the fact of the stock market crash. The Louisville Trust Company and National Bank of Kentucky—and counsel for plaintiff know this—when the combination was formed had one bank building, the Louisville Trust Building. It was like a turkey; an old fellow said a turkey was an inconvenient bird, too big for one person and too little for two. The

Opening Statement of Mr. Allen P. Dodd

Louisville Trust Company Building might have been too big for one bank and too little for two. The purpose was to put both of them in there. Now, the building at 421 Market—Fifth and Market, they didn't own—were unable to settle on that question as between the managing officers of these two concerns until June, 1930. In the meantime the Louisville Trust Company had been surveyed—the third floor of the Louisville Trust Company was picked out to ultimately house—was thought to be the proper place to house the BancoKentucky Company in the Fall of 1929. Between September and December, 1929, it was suggested. Mr. Brown desired to withdraw as President of the Bank and devote all of his time to the BancoKentucky, and our feeling, like all the others', was that prosperity was just around the corner. The reason why it was not located there is because of the situation that followed the stock market crash.

Now, we come down to the first statement got out by Banco. There were three of them. The statement of December 31, 1929, as to earnings and dividends—now, to emphasize what is said here, and let Your Honor know what actually happened—from the statement made here you would get the impression that dividends came out of the National Bank of Kentucky and the Louisville Trust Company alone, and were finally paid to the stockholders of those banks alone also. At that time the BancoKentucky Company had 525,744 trustees' participation certificates, according to this statement; they had 44,220 shares of the Brighton Bank & Trust Company, 47,216 shares of the Pearl Market Bank & Trust Company, 548 shares of the Central Savings Bank & Trust Company, they had 1,428 shares of the Peoples Liberty Bank & Trust Company; they had 625 shares of the Union Central Life Insurance Company; they had cash in the National Bank of Ken-

Opening Statement of Mr. Allen P. Dodd

tucky, \$2,100,000; they had cash in the Louisville Trust Company, \$550,000; and they had bills receivable, \$2,000,000. Now, the earnings, according to this statement, the gross earnings, were \$369,104.23. They had net earnings of \$344,103.14, of which, figuring on this statement, they got \$210,297.60 from the Bank of Kentucky and Louisville Trust Company, 70 per cent of which was contributed by the Bank of Kentucky, or \$147,208.32, leaving the income from other sources, \$221,895.91. After deducting expenses they paid the dividend to the stockholders of the Banco-Kentucky Company, \$306,553.80, or 20 cents a share, and yet he would have you understand it was just a transfer from one into another. This income, from which was deducted expenses, was then applied to the payment of dividends. That is the statement of January 1, 1930, as of the close of business of December 31, 1929.

We have another statement of the Banco-Kentucky Company—I am giving you the statements of that company figured at the time by its auditor and signed by its auditor. It gives the total asset value here and the other values that I have read to you, to which was added the shares of the First National Bank of Paducah and the shares of the Ashland National Bank.

The Court: Read the date of it.

Mr. Dodd: I don't know the date; I am just giving you the statement.

The Court: I mean the date of the statement.

Mr. Dodd: September 18, 1930, showing the complete assets of \$62,915,919.71, and cash on hand, \$20,804.52, bills receivable, still \$2,000,000—I will explain that \$2,000,000 bills receivable—first, I will explain it to you as I go along. The stockholders of the Banco-Kentucky Company, exactly like the stockholders and directors of the National Bank of Kentucky, had things put over on them. The inside of this

Opening Statement of Mr. Allen P. Dodd

is that Mr. James B. Brown borrowed \$2,000,000 of this money on November 13, 1929, and from our investigation and from the proof we had in another case, it was not even entered on the books until November 17, 1930, after the bank was closed. The stockholders, on their side, knew nothing about it, and nobody else except Mr. Brown and Mr. ZurSchmiede. That is that bills receivable; that is the explanation.

Let's stop a moment on Caldwell & Company and give Your Honor the facts as they appeared to the people at the time, what they saw and what they acted upon. That company was bought, that is, 10,000 shares, on May 30th—

The Court: A half interest in Caldwell & Company.

Mr. Dodd: That was on May 30, 1930. It was bought this way: The BancoKentucky Company didn't pay anybody; the purchase price was paid in to Caldwell & Company; they didn't buy it from Rogers Caldwell or any other stockholder; they contributed \$2.20 of their stock, of which they would get back one-half through owning the stock of Caldwell, for every dollar of net asset value that Caldwell & Company had. It worked out, according to the contract, they paid for it in stock of the BancoKentucky Company 900,000 shares of that stock for 10,000 shares of Caldwell & Company, which was a half interest. That was set up in its statement as an asset by the auditor, and properly so, and I am going to explain that, just exactly what that is. It was set up in this statement here "Caldwell & Company, \$22,500,000." That was the stock. Now, Caldwell & Company as presented to the Board of the BancoKentucky Company, had a sustained net earning over a period of three years of something like \$2,300,000 a year; it had \$40,000,000 of assets; it had twenty-two officers in the United States engaged in the investment banking business and was known prior to that time as the Morgan of the

Opening Statement of Mr. Allen P. Dodd

South all over the country, underwriting and selling securities at huge profits. It was conceived at that time by the Directors of the Banco Kentucky Company that this was a place to dispose of these 2,000,000 shares of stock it had, at \$25 a share, in the backlog, and that they would get an organized investment business in which they would take a half interest and control, or have a voice in. In other words, they were still pushing the original thought, to get to a place where, stopped only by the depression, where they could do and perform what they said, throughout the South. It turns out now, by an audit that was made in 1930—it was mentioned here—we now find, looking backwards, that Caldwell and Company was insolvent. As I said awhile ago, you will find some strange things.

Now, if Your Honor please, I stated at the outset that one of the prime things in this case to lay at the door of those stockholders with reference to the National Bank of Kentucky is a brief history of the solvency of the National Bank of Kentucky. Let's go back to the solvency of the National Bank of Kentucky for a moment, and the knowledge of these parties as stockholders of the National Bank of Kentucky. I don't think anybody will dispute the fact that in construing that section of the statute I read to you, it was unanimously thought, as to the impending failure of a bank, that, in order to hold the stockholder you must show he had a knowledge of it. In the Carson case that was an issue and that is an issue here. I bring it up simply to show it is an issue. Nothing was said responding to that by counsel for plaintiff, except what the proof would show as to knowledge of what went on inside the Bank of Kentucky, but from September, 1929, on what went on inside the bank was unknown, not only to the stockholders, but also to the directors. The question of solvency of the National Bank of Kentucky is no longer an issue in this case, and right

Opening Statement of Mr. Allen P. Dodd

here I want to make an observation, and if I am wrong I want to be corrected: I want to comment about this bill and about this lawsuit just a moment, and I think it is pertinent. There isn't an issue raised here on the two urged issues or any sub-issues, or on the testimony coming in, that hasn't been decided by some court adverse to the plaintiff in this case.

Let's start off about the solvency of the Bank of Kentucky. In the bank case this same Receiver sought to recover from the directors dividends beginning July 1, 1927, up to and including the last dividend paid, October, 1930, \$2,240,000, on the ground that the bank, as he indicated here, had been drifting down, and therefore had not earned the money, and therefore the directors having paid the money out were liable. Your Honor, we spent some six weeks, in and out, taking proof on that issue. If it earned dividends it could not be insolvent, because its capital always had to be kept intact, and it also had to have a reserve. Issue was joined and proof was had. The capital structure of the Bank was \$4,000,000 capital, \$2,000,000 surplus and undivided profits and reserve, about \$800,000. After putting on experts and fishing around among the assets of the bank and everywhere they could to say it was bad, and calling it a statutory bad debt, the Master found that the dividends had been earned and paid out of the undivided profits of the bank. On exceptions to that finding, which touched the very guts, if you please, of the solvency of this bank, it went up to Judge Tuttle on exceptions filed by this very receiver. Judge Tuttle not only overruled those exceptions, he adopted the Master's findings. Those are the facts, and I think you can shut in a narrow field any testimony on that point. Here is what Judge Tuttle said: "The Master disallowed this claim in its entirety, finding that the evidence failed to show any facts indicating any statu-

Opening Statement of Mr. Allen P. Dodd

tory violation by any of the directors, or any negligence on their part in connection with these dividends. The Master discussed and analyzed, at great length and in much detail, numerous debts which the plaintiff claims should have been charged off as statutory bad debts, and after painstaking and thorough consideration of such debts and of the other relevant facts and circumstances, the Master found that the evidence did not sustain this claim of the plaintiff. To recite or review these details would unduly prolong this opinion and would serve no useful purpose. It is sufficient to say that the findings of the Master are convincingly supported by the record. It is entirely clear, and I find, that the witnesses on whom the plaintiff relied in this connection, had no personal knowledge of the facts concerning which they assumed to testify. There is no competent evidence sufficient to sustain the burden resting on the plaintiff of proving that any of these dividends were paid out of the capital of the bank, or were not paid out of its net profits after deducting therefrom its losses and bad debts, including all debts on which interest was past due and unpaid for a period of six months, and which were not well secured, and all debts in process of collection. It appearing that the findings of the Master are supported by the record, such findings are affirmed and no recovery against these directors by reason of the declaration or payment of these dividends will be awarded."

Judgment was entered dismissing that claim, and this Receiver never appealed from it. That is final.

Now, if Your Honor please, the Receiver never even appealed that and never claimed that that question was involved in the Circuit Court of Appeals or Supreme Court. The bill was dismissed and there was no argument. That is the best measure of the solvency or prosperity of that bank that you could find during this period, because that

Opening Statement of Mr. Allen P. Dodd

bank paid \$640,000 in dividends through these four years, from net earnings.

The Court: Wasn't that same question raised in the directors' suit?

Mr. Dodd: That is what I am reading from.

The Court: Didn't Judge Tuttle determine the directors were liable?

Mr. Dodd: He held they were not liable; he did not hold them on dividends, no, sir. I saw that judgment written myself "No recovery on dividends." That was an issue, though, and an issue that affected the vital question of the solvency of the National Bank of Kentucky during all that period.

Now, there is one other case where that same question was raised, and that was the Venhoff & Hillen case. On November 15, the last day the bank was open, at 8:30 at night, Venhoff & Hillen took \$1100 and deposited it in the bank, which Monday morning did not open. They brought suit in this court to recover from the receiver, Paul Keyes, on the ground that the bank was insolvent. An answer was filed to that denying it and Paul Keyes, the receiver, predecessor to this receiver, and Tom ZurSchmiede and the leading bank examiner, Frank Dugan, all testified that the bank was solvent on the last day it lived. His Honor, Judge A. M. J. Cochran, found it to be solvent and gave this receiver the money put in there by Venhoff & Hillen. So, it was solvent then, and there is no use——

The Court: Did he rule expressly on that point?

Mr. Dodd: Yes; and I have his judgment here and I would be glad to read it to you.

The Court: There is no use going into authorities now.

Mr. Dodd: So, twice the court has passed on that and we think that eliminates from this case the question of any testimony relating to that one question, because we feel

Opening Statement of Mr. Allen P. Dodd

that these decisions bind this receiver to the fact that this bank was solvent.

Now, let's go one step further: Let's show what came into that case, the facts. You know, under the banking act, every six months it is the duty of the cashier of the bank to make a report of dividends and earnings and send it in to the Comptroller's Office. In that report he has got to set out the undivided profits and the statutory bad debts, and a report of earnings and the payment of dividends. Those were sent in every year—sent in quarterly on dividends and semi-annually on earnings. Those statements are here and we have certified copies. In every national bank examiner's report the bank examiner is required to certify whether this report is correct, and every one of them, until the bank closed, contained that certification; every dividend was certified as earned after taking into consideration all the facts inside the bank from the examination at the time. Now, if the Court please, we think, for the reasons I have stated, the judgment on dividends, the reports of earnings and the Venhoff & Hillen case, that testimony is precluded in this case on that point. That ought to shorten this case.

We had a notice served on us in this case, if Your Honor please,—and there is another thing we can save time on—notice was served on us with reference to the admission as genuine the minutes of the National Bank of Kentucky, the Board of Directors. The purpose of that is to try to show some kind of notice to the directors about certain letters criticizing the bank and its control. That was an issue in the bank case and the verity of those minutes was challenged by the directors, and it was successfully established that they had been forged in all of them so as to make it appear that the letters criticizing the bank had been read to the Board. Then, there is another one; you will find here they will want to introduce into this case the National Bank

Opening Statement of Mr. Allen P. Dodd

Examiners' reports for five years or four years—the number is immaterial—and in those reports is various criticism that was inserted therein by the Comptroller. The purpose of introducing that is to try to show some kind of notice to the directors of the knowledge of this criticism. That was another issue in the bank case. It was tried out before the Master and resulted in a finding of fact of the Master, confirmed by Judge Tuttle and further approved by the Circuit Court of Appeals, and I want to read you just exactly what that is, to show you the facts that have been found with reference to those matters. I will read you the Master's findings, and it is confirmed all the way through: "I don't think that any of these letters reached the Board of Directors, notwithstanding the recitation in the minutes to that effect. The minute book now indicates that there were six such letters presented and read to the Board, namely, December 16, 1927, page 304 of the minute book; June 1, 1928, page 318 of the minute book; June 8, 1928, page 319 of the minute book; June 22, 1928, page 320 of the minute book; August 31, 1928, page 325 of the minute book; and December 7, 1928, page 332 of the minute book. It is satisfactorily established that the minutes, after being read to the Board were fraudulently altered so as to show the presentation and consideration of these letters."

The Court: What do you mean, that these letters will be offered in this case to prove insolvency?

Mr. Dodd: No, to prove notice to the directors of the bank.

The Court: I can see why it might be competent in the directors' case, but not in this case.

Mr. Dodd: Here is why he is bringing it here: The criticism in the bank report—that criticism in itself might show some evidence of a failing condition of the bank.

The Court: Let's let that go until it is presented.

Opening Statement of Mr. Allen P. Dodd

Mr. Dodd: I am not asking you to pass on it; I am simply stating it.

Now, if Your Honor please, there is one other fact we are going to show in this case with reference to the severability of these corporations, the line of cleavage between the National Bank of Kentucky and the BancoKentucky Company, which started out with its incorporation; its separateness of incorporation and separateness of stockholders and officers. Let's see what was done after the failure: The first thing done after the failure by the receiver was to sue the BancoKentucky Corporation. It filed suit and it had to get consent from the Jefferson Circuit Court to file that suit. It filed a petition setting up that fact, and also the fact that it was the owner of all this stock of the Bank of Kentucky, and they asked permission of the Jefferson Circuit Court to sue the BancoKentucky Company as owner of this stock. The order was entered and that suit was filed, and the Receiver got judgment for the full amount, and finally collected \$90,000. I cite that as a fact.

Now, in addition to that, in responding to the statement that it had no expenses and there were no officers: Paul Keyes, the Receiver for the National Bank of Kentucky made and filed a valid proof of claim for all services rendered to Banco for keeping its books, in the amount of \$22,000. He treated it as a separate corporation in their way of business. That isn't for money; that is for services performed in keeping the records. The Louisville Trust Company filed a claim for \$22,000 for services performed, treating it as a separate institution, and not as an agency or instrumentality of the banks. These exhibits will be offered in this case.

Next we come to the good faith of the BancoKentucky Company. We have said that the facts we have demon-

Opening Statement of Mr. Allen P. Dodd

strate the good faith; the investments we have put in, the number of stockholders, and the manner in which it was done. Here are people accused of trying to avoid something—the huge sums they themselves put in disprove any ulterior motive and disprove any idea of fraud, and, like all the other issues brought here, they are all decided one way. There is another issue, this very thing, the good faith of the BancoKentucky Company: That has been decided by Judge Sandidge, first, and by the Circuit Court of Appeals. I don't want to take up Your Honor's time reading it, but the whole good faith of the BancoKentucky Company and the purpose for which it was organized are already passed upon. The fact showing it was in good faith and legal and proper—everything legal about it—it wasn't a sham; it was a bona fide corporation, and that was the finding in the bank case, and that was an issue there.

Now, I don't want to extend this any longer, because I have tried to outline the position of these directors, but let me say this in conclusion, if I may: This suit follows—this is about the ninth suit involving the issues that they have in this case, or some part of them, and this suit is best described, from a fellow who has been on the other side in all of them, as just taking a bite out of each one and putting them together and starting out on a new theory. All these bites or issues have already been decided. This is the third suit filed by the Receiver to recover for the creditors against the directors of the Bank of Kentucky.

The Court: How could the Receiver—you say that question was decided by Judge Tuttle as to solvency: How could he give judgment against them, then?

Mr. Dodd: He could give judgment for statutory violation whether you are solvent or insolvent.

The Court: You say he gave judgment on statutory grounds? Under the statute they were liable for negligence?

Opening Statement of Mr. Allen P. Dodd

Mr. Dodd: No, sir. In several of the cases he said they were free of negligence, but held them for statutory liability. I will illustrate that: The statute of the United States forbids a bank to lend more than ten per cent of its capital to any one person or corporation. All those loans were supposed to be excess loans, ultra vires and beyond the statute. The only liability Judge Tuttle enforced was based upon statutory violation, and not on negligence.

Mr. Crawford: It had nothing to do with the worth of the loan one way or the other. For instance, in the Wakefield matter he grouped together four people and said—four people properly collateraled—and said they should have been grouped together and the directors ought to have known it, and for that reason he held that those loans violated the law and charged it to the directors. Everything he found for the Receiver was of that type.

Judge Deitzman: And but for the subsequent insolvency of the bank that would have gone to the benefit of the stockholders. The statutory liability went to him then because the bank was insolvent; had it not been for that it would have gone to the benefit of the shareholders.

Mr. Dodd: Now, if Your Honor please, we will go back: There are two classes of stockholders here, those who have exchanged—and we describe them that way—those who exchanged their Trustees' Participation Receipts and those who bought their stock. As we see it, whether they paid for it in cash—you see, when the National Bank of Kentucky closed there were 2,000,000 shares out, and over one million were exchanged—some 400,000 bought for cash and the rest were exchanged for bank stock, like the Paducah Bank and Ashland Bank, where they didn't pay them any cash and where they took so many shares for their stock—our contention on this is that there are two classes of stockholders, those who exchanged and those who bought. The

Plaintiff's Evidence

only reaction to double liability—the reaction here to the liability that is sought to be imposed is asserted against two separate classes, one accused of having sold its stock—of having transferred its stock, and the other is one who never had stock at all, but purchased it, was never associated with the Bank of Kentucky at all in any capacity, stockholder or otherwise. Now, whatever may be said about the one, if by any stretch of the imagination you could hold the Trustees' Participation Receipt holders—

The Court: You mean there might be a judgment distinguishing between the two groups?

Mr. Dodd: Yes, I am trying to respond to that very proposition.

The Court: And your argument is that they are not charged with any knowledge?

Mr. Dodd: Of anything that happened or any record in the bank.

The Court: Of any record in the bank or any action of any director?

Mr. Dodd: That is right. That is the line of our defense, and those, as briefly and as best I could, charged with this duty of stating the facts, are the issues as we see it.

PLAINTIFF'S EVIDENCE

Plaintiff read into evidence the request which it made on defendants for admission of facts and genuineness of documents under Rule 36 of the Rules of Civil Procedure for the District Court of the United States.

The request for admission contained 184 separate paragraphs and these paragraphs together with the response to the request follows.

1. That The National Bank of Kentucky was, at all of the times referred to in the Bill of Complaint, and is a

Plaintiff's Evidence

national banking association, organized under the laws of the United States, commonly known as The National Bank Act, and domiciled at Louisville, Jefferson County, Kentucky.

Admitted in response.

2. That on November 16, 1930 said Bank was closed pursuant to a resolution duly adopted on that date by its Board of Directors. "Exhibit 1" is the resolution.

Admitted in response and the exhibit referred to was admitted in evidence.

3. That on November 17, 1930 the Comptroller of the Currency of the United States found said National Bank of Kentucky insolvent and unable to pay its just and lawful debts and appointed Paul C. Keyes Receiver of said Bank. "Exhibit 2" is the order of appointment of said Paul C. Keyes. Said Paul C. Keyes duly qualified and entered upon his duties as such Receiver and took possession of all the books, records and assets of said Bank and continued in the control and possession thereof as such Receiver until December 15, 1932, on which date he resigned. Thereafter, on December 15, 1932, F. G. Awalt, then Acting Comptroller of the Currency, appointed the plaintiff, A. M. Anderson, Receiver of said National Bank of Kentucky, who forthwith qualified and entered upon the duties of his office, as such Receiver, took possession of all the books, records and assets of said Bank and still is in the possession and control thereof as such Receiver, and is now the duly appointed, qualified and acting Receiver of said bank. "Exhibit 3," is the certificate of appointment of A. M. Anderson, Receiver of said Bank, dated December 15, 1932.

Admitted in response and the two exhibits were admitted in evidence.

4. That the individual defendants named in the caption of the Bill of Complaint are correctly described as to citi-

Plaintiff's Evidence

zenship and residence and that the corporate defendants are correctly described as to corporate organization. That on November 17, 1930, said defendants were severally the owners of record of stock of the Banco Kentucky Company, as alleged in the Bill of Complaint, except as otherwise pleaded in the Answers filed herein.

Admitted by defendant with the proviso that Special Pleas as to residence might be later considered and are not to be included in the admission.

5. That on February 20, 1931, the Comptroller of the Currency of the United States levied and made an assessment and requisition upon the shareholders of the National Bank of Kentucky for \$4,000,000.00, to be paid by them on or before the first day of April, 1931, and made demand upon each and every one of them for the par value of each and every share of the capital stock of said Association held or owned by them respectively at the time of its failure. "Exhibit 5," is the order of assessment referred to. That on March 20, 1931, the Receiver of said National Bank of Kentucky served all defendants and all other Banco Kentucky shareholders with notice of said assessment and of intent to proceed against them to recover a proportionate part thereof. "Exhibit 6," is the notice to shareholders referred to in said paragraph. That the allegations of Paragraph XVIII of the Bill of Complaint are true.

Admitted with the provision that Special defenses could be filed as to defendants who had died. Exhibits 5 and 6 were admitted in evidence.

6. That at the time of the closing of the National Bank of Kentucky, it had issued and outstanding 40,000 shares of capital stock of the par value of \$100.00 each; that 39,820 of said shares were registered on the stock ledger of said bank in the names of Henry Vogt, Thomas J. Minary, Stuart E. Duncan, Allen P. Dodd, Charles H. Bohmer

Plaintiff's Evidence

and Ben J. Metcalfe, as Trustees under Trust Agreement dated April 22, 1927. "Exhibit 7," is the Trust Agreement of April 22, 1927. That the remaining 180 shares of said Bank were registered on the stock ledger of said Bank, 10 shares each, in the names of the eighteen directors of said bank, in order to qualify said directors. "Exhibit 7(a)" shows the directors of the National Bank of Kentucky, the assessment on their respective qualifying shares, the amounts paid and the balance, if any, due thereon.

This paragraph was admitted by the defendants as true with the exception that defendants denied that the words "In order to qualify said directors;" was the purpose of the registration of said stock in their names. Exhibits 7 and 7(a) were admitted in evidence.

Mr. Castleman objected to the introduction of documentary evidence on behalf of defendants who acquired their stock in Banco on the open market, and made a motion that such objection apply to each item of documentary evidence, which motion was granted by the court.

7. "Exhibit 8" is the Minutes of the Trustees under the Trust Agreement of April 22, 1927.

Admitted in response—Exhibit offered in evidence and admitted.

Mr. Dodd objected that every stockholder who bought stock could not be charged with notice of what was shown by the Minute Book of the Trustees of the Bank of Kentucky and Louisville Trust Company.

8. That the certificates representing the directors qualifying shares were kept in a safe deposit box in the Louisville Trust Company, which box was in the name of the six men who were trustees under said agreement of April 22, 1927. The certificates were in the names of the individual owners.

Admitted in response.

Plaintiff's Evidence

9. That at the time of the closing of the National Bank of Kentucky, said Trustees held, under the same Trust Agreement, 17,235 shares of the capital stock of the Louisville Trust Company out of the total issued and outstanding stock of said Trust Company of 17,500 shares. That the remainder of said shares were registered on the stock ledger of said trust company in the names of its directors, 10 shares each. That the qualifying shares of the directors of said National Bank of Kentucky and said Louisville Trust Company were subject to agreements between said directors and the trustees as shown by the Minutes of said trustees. The shares of stock registered in the names of the directors of the Louisville Trust Company representing qualifying shares were also kept in a safe deposit box with the Louisville Trust Company, in the names of the six men who were Trustees under said Agreement of April 22, 1927.

Admitted in response.

10. That pursuant to the terms of said Trust Agreement, the Trustees issued to each stockholder of the National Bank of Kentucky and each stockholder of the Louisville Trust Company whose stock was deposited with said Trustees, a Trustees' Participation Certificate having a par value of \$100.00 in lieu of each share of stock of the Bank or Trust Company having a par value of \$1000.00. "Exhibit 9" is a Trustees' Participation certificate issued as aforesaid.

Admitted in response. Exhibit 9 admitted in evidence.

11. Thereafter, on June 22, 1927, each share of the trust estate having a par value of \$100.00 per share was divided into ten shares of the trust estate each having a par value of \$10.00 per share; except for the change in par value, said Trustees' Participation Certificate remained unchanged. "Exhibit 10," is a \$10.00 par Trustees' Participation Certificate referred to.

Plaintiff's Evidence

Admitted in response. Exhibit 10 admitted in evidence.

12. Each trustees' participation certificate having a par value of \$10.00 represented .0697923 of a share of the capital stock of the National Bank of Kentucky, having a par value of \$100.00 per share.

Admitted in response.

13. The following writings relate to the unification of the National Bank of Kentucky and the Louisville Trust Company and the interests of the stockholders thereof.

Admitted in response.

14. Exhibit 11-1—Letter of March 19, 1927, received by the Comptroller of the Currency from Louisville Trust Company.

15. Exhibit 11-2—Letter of March 22, 1927, received by the Louisville Trust Company from Deputy Comptroller E. W. Stearns.

16. Exhibit 11-3—Letter of March 25, 1927, received by E. W. Stearns, Deputy Comptroller from Louisville Trust Company.

17. Exhibit 11-4—Letter of April 7, 1927, received by the Louisville Trust Company from E. W. Stearns, Deputy Comptroller.

18. Exhibit 11-5—National Bank of Kentucky Directors' Minutes of April 1, 1927, with reference to unification of National Bank of Kentucky with Louisville Trust Company. (See Exhibit No. 21.)

19. Exhibit 11-6—National Bank of Kentucky Directors' Minutes of April 22, 1927, setting forth the plan and Trust Agreement adopted, the form of stockholders' receipt of the Plan of unification and consent thereto, and the letter of April 22, 1927, which was mailed by the National Bank of Kentucky to all of its stockholders. (See Exhibit No. 21.)

20. Exhibit 11-7—Minutes of the Stockholders of National Bank of Kentucky, May 27, 1927, approving declara-

Plaintiff's Evidence

tion of sixty per cent stock dividend and increasing the Board of Directors to forty and electing twenty-one Directors of the Louisville Trust Company to the Directorate of the National Bank of Kentucky. (See Exhibit No. 21.)

Paragraphs 14 through 20, inclusive, were admitted in the response, and the Exhibits referred to in these paragraphs were offered in evidence and admitted by the court.

21. "Exhibit 12," is the Daily Financial Statement Books of the National Bank of Kentucky from February 11, 1927, to November 16, 1930.

Admitted in response and exhibit admitted in evidence.

22. That the National Bank of Kentucky was examined by the National Bank Examiners as of April 23, 1927, October 14, 1927, March 9, 1928, October 13, 1928, May 25, 1929, December 31, 1929, April 26, 1930, September 17, 1930. "Exhibits 13, 14, 15, 16, 17, 18, 19 and 20" are photostatic copies of the reports of the aforesaid examinations as certified by the Comptroller of the Currency and delivered to said bank.

Admitted in response and exhibits referred to admitted in evidence.

23. That the Minutes of the Meeting of the Board of Directors of the National Bank of Kentucky, held on June 7, 1929, contained the following recital:

"Mr. Brown's proposition to form a new company with a proposed capital of \$20,000,000 organized to own stock of other corporations, all, or in part, buy and sell securities, original and refinancing, etc., was submitted to the Board of Directors and the Board expressed themselves as favorable, and on motion duly seconded and unanimously carried the President was authorized to proceed along the lines outlined."

"Exhibit 21" is the original Minute Book containing the Minutes of the National Bank of Kentucky, as kept and

Plaintiff's Evidence

recorded therein from January 14, 1927, to November 16, 1930.

Defendants' response with respect to this paragraph read:

"Defendants admit all of paragraph No. 23, except the correctness of Exhibit 21 for the reason that in the case of *Anderson v. Akers*, 7 Fed. Sup. 924, this court has heretofore adjudged that said minutes have been fraudulently altered."

The exhibit was admitted in evidence.

24. "Exhibit 22" is the original letter of Trabue, Doolan, Helm and Helm, attorneys for the National Bank of Kentucky, sent to and received by Charles F. Jones, Cashier of the National Bank of Kentucky, which was signed by T. K. Helm, dated September 5, 1929, and with which was enclosed a true and correct copy of a letter sent by said Helm to and received by the said Jones, as Cashier, dated June 14, 1929.

The statement was admitted in response. Mr. Crawford objected for everybody except Mr. Helm and Mr. Jones on the grounds that none of the stockholders of the bank, even including the directors, are chargeable with any knowledge of interoffice correspondence, or correspondence that comes to the bank, unless it is actually presented to the Board, and then its competency only goes to the Board itself and not to the stockholders.

The exhibit was admitted in evidence.

25. That on July 12, 1929, the Trustees, under the Trust Agreement of April 22, 1927, held a meeting and authorized the organization of the BancoKentucky Company under the laws of Delaware, as shown by the Minutes of said Trustees for said date.

26. That on July 16, 1929, the corporation known as The BancoKentucky Company, was organized under the laws

Plaintiff's Evidence

of the State of Delaware. "Exhibit 23," is a complete and correct copy of the Minutes of the Banco Kentucky Company, from the time of its organization to and including the last meeting of its Board of Directors on November 19, 1930. The Minutes of the first meeting in said Minute Book contains an authentic copy of the Certificate of Incorporation of the Banco Kentucky Company.

27. Mr. A. J. Carroll, a Director of the National Bank of Kentucky and the Louisville Trust Company, and an attorney for the National Bank of Kentucky, was present at the incorporation of the Banco Kentucky Company at Ex. 24

Dover, Delaware. "Exhibit 24," is the original copy of his letter, reporting the organization of said Company received by Mr. Charles F. Jones, Cashier of the Bank, contained in the files of said bank.

Ex. 24-1

28. "Exhibit 24-1" is the original telegram from A. J. Carroll, reporting the mailing of the corporation records to Louisville, dated July 17, 1929, and requesting that a copy of the Prospectus be sent to him at Atlantic City, contained in the files of said bank.

Ex. 24-2

29. "Exhibit 24-2" is the original carbon copy of the letter sent to and received by A. J. Carroll, dated July 20, 1929, which enclosed a copy of the printed letter sent to all stockholders.

These five paragraphs were admitted in the response and the exhibits referred to were admitted in evidence.

Ex. 24-3

30. "Exhibit 24-3" is the original printed letter, dated July 19, 1929, which was mailed to all stockholders of the National Bank of Kentucky and all stockholders of the Louisville Trust Company, signed by all Directors of

Plaintiff's Evidence

the National Bank of Kentucky and by all Directors of the Louisville Trust Company and by the Trustees under the Trust Agreement of April 22, 1927, a copy of which was enclosed with said "Exhibit 24-2."

This paragraph was admitted in the response. Objection to the exhibit was offered by Mr. Van Winkle against use of the letter as against purchasers of stock who were not certificate holders. The exhibit was admitted in evidence.

Ex. 24-4

31. "Exhibit 24-4" is a perforated sheet entitled "Subscription to shares of Banco Kentucky Company, Incorporated (Under the Re-organization Plan as Outlined in the Letter of the Trustees dated July 19, 1929)," attached to Exhibit 24-3.

Ex. 24-5

32. "Exhibit 24-5" is the printed letter from Banco Kentucky Company of September 12, 1929, sent to all Trustees Participation shareholders, which enclosed a copy of said letter of July 19, 1929.

Ex. 24-6

33. "Exhibit 24-6" is the printed letter from Banco Kentucky Company to all subscribers requesting payment of subscriptions on or before October 1, 1929.

These three paragraphs were admitted in the response and the exhibits mentioned were admitted in evidence.

Ex. 25

34. "Exhibit 25" is the original opinions of Robert F. Vaughan, one of the attorneys for the National Bank of Kentucky, dated July 6, 1929 and July 9, 1929, with enclosures, contained in the files of said bank.

This paragraph was admitted in the response. Over objection of Mr. Crawford the exhibits were received in evidence. The letter of Robert F. Vaughan, dated July 6, 1929, was marked Exhibit 25. The letter of July 9, 1929, was marked Exhibit 25-5. The enclosures referred to in

Plaintiff's Evidence

the letter of July 9, 1929, consisting of "suggested preface Ex. 25-1

to the prospectus"—Exhibit 25-1, and draft of prospectus headed "To the Stockholder Addressed," Exhibit 25-2, and memo from Richard Bean to Mr. Vaughan—Exhibit 25-3, and additional suggestion for draft of prospectus, Exhibit 25-4, were all offered and received in evidence.

35. That on or about July 20, 1929, public announcements were made of the organization of the BancoKentucky Company, which was given wide publicity in the Louisville newspapers. Further publicity was given from time to time to said Company in the public press throughout America and in various financial and investment publications.

Ex. 26

36. "Exhibit 26" is a correct photostatic copy of articles with reference to the BancoKentucky Company appearing in the Herald-Post, Courier-Journal and Louisville Times, papers of general circulation in Kentucky and in Indiana, on the following dates:

Herald-Post—July 20, 21, 22, 1929; September 14, 17, 26, 27, 30, 1929; October 6, 11, 13, 14, 15, 20, 1929; December 14, 1929; February 8, 1930; March 9, 1930; March 28, 30, 1930; April 2, 1930; May 11, 1930; June 2, 8, 15, 1930; November 5, 6, 11, 12, 15 and 17, 1930.

Courier-Journal—July 20, 21, 1929; August 17, 1929; September 13, 14, 21, 27, 1929; October 5, 10, 30, 1929; November 21, 1929; December 7, 22, 24, 28, 1929; January 4, 1930; April 1, 2, 1930; June 2, 1930; November 5, 6, 7, 11, 13, 14, 15 and 17, 1930.

Louisville Times—June 2, 1930; November 5, 6, 13, 14 and 17, 1930.

Ex. 26-1

37. "Exhibit 26-1" is the original clipping from the issue of July 23, 1929, of the American Banker, published in New

Plaintiff's Evidence

York City and circulated through the United States, which is a daily banking newspaper, contained in the files of said bank.

Ex. 26-2

38. "Exhibit 26-2" is a letter, dated September 11, 1929, from Stein Bros. & Boyce to James B. Brown, c/o National Bank of Kentucky and attached advertisement of Stein Bros. & Boyce, contained in the files of said bank.

Ex. 26-3

39. "Exhibit 26-3" is a letter, dated October 15, 1929, from Coast Banker to National Bank of Kentucky and enclosed tear sheet of June, 1929, issue of Coast Banker, also enclosing statement for advertising, contained in the files of said bank.

Ex. 26-4

40. "Exhibit 26-4" is Argus Pressclipping Bureau, clipping from September 27, 1929, issue of New York Herald-Tribune, contained in the files of said bank.

Defendants' objection to exhibit sustained.

Ex. 26-5

41. "Exhibit 26-5" is newspaper clipping under Covington, Kentucky, January 3, 1930, date line, contained in the files of the National Bank of Kentucky.

Ex. 26-6

42. "Exhibit 26-6" is letter, dated May 19, 1930, from The Commercial and Financial Chronicle to J. B. Brown, President, Banco Kentucky Company, contained in the files of the National Bank of Kentucky.

Ex. 26-7

43. "Exhibit 26-7" is Chronicle news item, November 23, 1929, contained in the files of the National Bank of Kentucky.

Ex. 26-8

44. "Exhibit 26-8" is Western Union telegram of February 17, 1930, from American Banker to Banco Kentucky

Plaintiff's Evidence

Corporation and copy of BancoKentucky Company answer thereto contained in the files of the National Bank of Kentucky.

Ex. 26-9

45. "Exhibit 26-9" is letter dated January 31, 1930, from American Banker to BancoKentucky Corporation, contained in the files of the National Bank of Kentucky.

Ex. 26-10

46. "Exhibit 26-10" is a letter, April 9, 1930, American Banker to BancoKentucky Corporation and enclosing news item from April 9, 1930, American Banker, contained in the files of said bank.

Ex. 26-11

47. "Exhibit 26-11" is January 17, 1929, evening edition of Herald-Post, front page, page 14-A and page 15-A, contained in the files of said bank.

Ex. 26-12

48. "Exhibit 26-12" is June 29, 1929, printed statement National Bank of Kentucky-Louisville Trust Company in joint ownership.

Paragraphs 35 through 48 were all admitted in the response, and the exhibits referred to were received in evidence over objection of the defendants.

Ex. 27

49. "Exhibit 27" is an original letter, together with enclosures, dated July 26, 1929, sent by Richard Bean, President of the Louisville Trust Company, Louisville, Kentucky, to and received by James B. Brown, President of the National Bank of Kentucky, Louisville, Kentucky, contained in the files of said bank.

This paragraph admitted in response. The defendants objected to this exhibit and to all other inter-corporate communications, on the ground that it was an inter-corporate matter of which the directors and stockholders knew nothing. The objection was overruled and the exhibit was received in evidence.

*Plaintiff's Evidence***Ex. 28**

50. "Exhibit 28" is an original letter sent by Richard Bean, President of the Louisville Trust Company to and received by James B. Brown, President of the National Bank of Kentucky, dated June 24, 1929, contained in the files of said bank.

Ex. 29

51. "Exhibit 29" is an original letter sent by Richard Bean, President of the Louisville Trust Company to and received by Charles F. Jones, Cashier of the National Bank of Kentucky, dated August 21, 1929, contained in the files of said bank.

Ex. 30

52. "Exhibit 30" is an original letter, with enclosures, sent by Richard Bean, President of the Louisville Trust Company to and received by James B. Brown, President of the National Bank of Kentucky, dated August 8, 1929, contained in the files of said bank.

Ex. 31

53. "Exhibit 31" is an original letter sent by Richard Bean, President of the Louisville Trust Company to and received by Charles F. Jones, Cashier of the National Bank of Kentucky, dated August 24, 1929, contained in the files of said bank.

Ex. 32

54. "Exhibit 32" is an original letter and enclosure sent by Richard Bean, President of the Louisville Trust Company to and received by Charles F. Jones, Cashier, National Bank of Kentucky, dated September 5, 1929, contained in the files of said bank.

Ex. 32-1

55. "Exhibit 32-1" is a photostat of a letter sent by Richard Bean, President of the Louisville Trust Company to and received by Charles F. Jones, Cashier, National Bank of Kentucky, dated August 24, 1929, contained in the files of said bank.

*Plaintiff's Evidence***Ex. 32-2**

56. "Exhibit 32-2" is an original letter sent by T. K. Helm to and received by James B. Brown, National Bank of Kentucky dated December 3, 1929, contained in the files of said bank.

Paragraphs 50 through 56, inclusive, were admitted in the response and the exhibits were received in evidence over objection of the defendants.

Exhibit 31 was admitted against Mr. Bean and Mr. Jones and objection sustained as to other defendants.

Exs. 33-1 to 33-25

57. "Exhibits 33-1" to "33-25" are correct photostatic copies of correspondence the originals of which were sent by the Comptroller of the Currency of the United States or his deputies to and received by the National Bank of Kentucky, under the following dates: June 30, 1927, September 7, 1927, December 12, 1927, January 19, 1928, January 27, 1928, April 30, 1928, May 12, 1928, June 2, 1928, June 16, 1928, August 23, 1928, November 27, 1928, January 14, 1929, March 23, 1929, July 12, 1929, August 6, 1929, August 29, 1929, September 17, 1929, February 21, 1930, March 19, 1930, April 11, 1930, June 23, 1930, July 23, 1930, August 9, 1930, September 9, 1930, and November 8, 1930.

Exs. 34-1 to 34-14

58. "Exhibits 34-1" to "34-14," both inclusive, are correct photostatic copies of letters sent by the National Bank of Kentucky, its officers or directors to and received by the Comptroller of the Currency of the United States, said letters being dated: July 23, 1927, September 16, 1927, December 24, 1927, January 24, 1928, February 4, 1928, June 8, 1928—including a certificate of C. F. Jones, Secretary, Board of Directors, National Bank of Kentucky, bearing same date with reference to said letter and a three-page list of loans attached to same; September 11, 1928—to which was attached and enclosed a three-page list of loans re-

Plaintiff's Evidence

ferred to in said letter; January 22, 1929, February 4, 1929, April 5, 1929—enclosed with which was a four-page list of items referred to in said letter; September 24, 1929, and the attached and enclosed letter sent out to stockholders of the National Bank of Kentucky under date of July 19, 1929; March 21, 1930, August 23, 1930 and October 24, 1930.

These two paragraphs were admitted to be correct in the response and the exhibits mentioned were admitted in evidence over objection of the defendants.

Ex. 35

59. "Exhibit 35" consists of 22 letters, either originals received by National Bank of Kentucky or copies of letters sent by John S. Akers, as Vice President of said bank to the person addressed concerning BancoKentucky Company or the stock of said company.

Ex. 36

60. "Exhibit 36" consists of 29 letters, either originals received by National Bank of Kentucky or copies of letters sent by E. B. Robertson, as Vice President of said bank to the person addressed concerning BancoKentucky Company or the stock of said company.

Ex. 37

61. "Exhibit 37" consists of 21 letters, either originals received by National Bank of Kentucky or copies of letters sent by J. J. Hayes, as Vice President of said bank to the person addressed concerning BancoKentucky Company or the stock of said company.

Ex. 38

62. "Exhibit 38" consists of 5 letters, either originals received by National Bank of Kentucky or copies of letters sent by H. J. Angermeier, as Vice President of said bank, to the person addressed concerning BancoKentucky Company or the stock of said company.

Ex. 39

63. "Exhibit 39" consists of 15 letters, either originals received by National Bank of Kentucky or copies of letters

Plaintiff's Evidence

sent by L. L. Fontaine, as Vice President of said bank to the person addressed concerning BancoKentucky Company or the stock of said company.

Paragraphs 59 through 63, inclusive, admitted in the response. The exhibits were received in evidence. Defendants' objection to Exhibit 36 was overruled.

64. The following exhibits are true and correct sample copies of the following documents:

Ex. 40

65. "Exhibit 40." Certificate of stock—National Bank of Kentucky.

Ex. 41

66. "Exhibit 41." Copy of bank stockholders' acceptance of the unification trust agreement of April 22, 1927.

Ex. 42

67. "Exhibit 42." Power of Attorney executed by National Bank of Kentucky stockholder authorizing exchange of National Bank of Kentucky stock for Trustees' Participation Certificates.

Ex. 43

68. "Exhibit 43." Certificate issued by the Trustees, delivered to National Bank of Kentucky stockholders in exchange for their shares. (See Exhibit No. 10.)

Ex. 44

69. "Exhibit 44." Interim Receipt issued to the holders of Trustees' Participation Certificates and subscribing shareholders pending completion of the reorganization outlined in letter of Trustees and Directors of July 19, 1929.

Ex. 45

70. "Exhibit 45." The BancoKentucky Company Temporary Certificate of Stock delivered to the holders of Trustees' Participation Certificates upon surrender of same under Banco Plan.

Ex. 46

71. "Exhibit 46." Permanent Certificate of Stock issued by the BancoKentucky Company.

*Plaintiff's Evidence***Ex. 47**

72. "Exhibit 47" is the original Minute Book containing true and correct Minutes of the Meeting of the Stockholders of the National Bank of Kentucky, from May 27, 1927, to March 21, 1930, inclusive.

Marked for identification and filed.

Ex. 48

73. "Exhibit 48" is a true and correct copy of a letter from James B. Brown, President of the National Bank of Kentucky, received by the Comptroller of the Currency, dated October 7, 1929, with reference to the denationalization of the National Bank of Kentucky.

Ex. 49

74. "Exhibit 49" is a letter from E. H. Gough, Deputy Comptroller of the Currency, received by the President of the National Bank of Kentucky, dated October 9, 1929, acknowledging receipt of Exhibit 48.

Ex. 50

75. "Exhibit 50" is an original letter from Robert Vaughan, an attorney for the National Bank of Kentucky, received by Charles F. Jones, Vice President of said Bank, together with enclosures attached to said letter, dated October 10, 1929.

Ex. 51

76. "Exhibit 51" is a letter from E. H. Gough, Deputy Comptroller of the Currency, received by Robert Vaughan, dated October 17, 1929.

Ex. 52

77. "Exhibit 52" is a letter from B. M. Mulvihill, Acting Chief, Division of Deposits, Office of the Secretary of Treasury, Washington, received by the Cashier of the National Bank of Kentucky, dated October 18, 1929.

Ex. 53

78. "Exhibit 53" is a letter from C. F. Jones, Cashier, National Bank of Kentucky, received by B. M. Mulvihill,

Plaintiff's Evidence.

Acting Chief, Division of Deposits, Treasury Department, dated October 21, 1929.

Ex. 54

79. "Exhibit 54" is a letter from C. M. Stewart, Assistant Federal Reserve Agent, St. Louis, received by Charles F. Jones, dated October 22, 1929, and list attached.

Ex. 55

80. "Exhibit 55" is a letter from B. M. Mulvihill, Acting Chief, Division of Deposits, Treasury Department, received by Cashier, National Bank of Kentucky, dated October 28, 1929.

Ex. 56

81. "Exhibit 56" is a letter from C. F. Jones, Cashier, National Bank of Kentucky, received by B. M. Mulvihill, dated November 7, 1929.

Ex. 57

82. "Exhibit 57" is a letter from E. H. Gough, Deputy Comptroller, received by Robert Vaughan, dated November 14, 1929.

Ex. 58

83. "Exhibit 58" is a letter from Robert Vaughan, received by Cashier, National Bank of Kentucky, dated November 18, 1929.

Ex. 59

84. "Exhibit 59" is a letter from Governor, Federal Reserve Bank, received by James B. Brown, President of the National Bank of Kentucky, dated November 18, 1929.

Ex. 60

85. "Exhibit 60" is a letter from John T. Moore, Cashier, Louisville Branch Federal Reserve Bank of St. Louis, received by J. J. Hayes, Vice-President of the National Bank of Kentucky, Louisville, Kentucky, dated November 26, 1929.

Ex. 61

86. "Exhibit 61" is a letter from Cashier, National Bank of Kentucky, received by Cashier, Federal Reserve Bank, dated December 5, 1929, with enclosure attached.

*Plaintiff's Evidence***Ex. 62**

87. "Exhibit 62" is a letter from John T. Moore, Cashier, Louisville Branch Federal Reserve Bank of St. Louis, received by C. F. Jones, Cashier, National Bank of Kentucky, dated November 26, 1929.

Ex. 63

88. "Exhibit 63" is a letter, with enclosures, from C. M. Stewart, Assistant Federal Reserve Agent, St. Louis, received by C. F. Jones, dated December 20, 1929.

Ex. 64

89. "Exhibit 64" is a telegram from F. G. Awalt, Deputy Comptroller of the Currency, sent to and received by the National Bank of Kentucky, dated December 26, 1929.

Paragraphs 64 through 89, inclusive, were admitted in the response. The exhibits were received in evidence. Defendants objected to Exhibit 47 and Exhibit 53. Exhibit 47 was received for identification and Exhibit 53 was received in evidence.

90. That all of the holders of Trustees' Participation Certificates issued under the Trust Agreement of April 22, 1927, approved and adopted the plan, signed the "Subscription to Shares of the BancoKentucky Company (under the Re-organization Plan as Outlined in the Letter of the Trustees dated July 19, 1929)" heretofore attached as Exhibit 24-4, or agreed to exchange of their Trustees' Participation Certificates for shares of the BancoKentucky Company in accordance with said Re-organization plan; except holders of approximately five per cent of said Trustees' Participation Certificates. Subsequently said Trustees' Participation Certificate Shareholders who signed said subscription to shares of the BancoKentucky Company, and/or agreed to exchange their Trustees' Participation Certificates for shares of stock of the BancoKentucky Company, deposited said Trustees' Participation Certificates with the Louisville Trust Company as transfer agent for said Trustees and

Plaintiff's Evidence

received a document entitled "Trustees of National Bank of Kentucky and Louisville Trust Company Interim Receipt Issued Pending Completion of the Re-organization outlined in letter of Trustees and Directors dated July 19, 1929." (Exhibit 44.)

91. That subsequently said plan of Reorganization was declared effective and said Trustees' Participation Certificates were exchanged on the basis of two shares of the BancoKentucky Company stock for one Trustees' Participation Certificate and said shares of the BancoKentucky Company stock so exchanged were delivered by the Louisville Trust Company, as transfer agent for said Trustees, to the holders of said interim receipts. Upon delivery of said interim receipts to the said Trust Company as transfer agent, said Trustees' Participation Certificates held by the Louisville Trust Company, as transfer agent for said Trustees, were delivered to the BancoKentucky Company.

92. That the holders of 570,550 shares of the trust estate approved and adopted the plan above described and the holders of 540,484 shares of the trust estate, representing 37,721.6214 shares of stock in the National Bank of Kentucky and stock of the Louisville Trust Company exchanged their Trustees' Participation Certificates for 1,080,968 shares of BancoKentucky Company stock. By reason of said exchange, the BancoKentucky Company received and held approximately 95% (94.73%) of the issued and outstanding Trustees' Participation Certificates, which were also registered in its name on the stock register of said Trustees, and which represented approximately 95% of the shares of stock of the National Bank of Kentucky held by said Trustees.

93. That after the issue of the shares of the BancoKentucky Company in exchange for Trustees' Participation Certificates, a substantial majority of the shares of the

Plaintiff's Evidence

BancoKentucky Company was at all times owned by the same persons who previously held Trustees' Participation shares, and the BancoKentucky Company was managed and operated by the same persons who constituted the Board of Directors and the officers of the National Bank of Kentucky-Louisville Trust Company, as set forth in Paragraph 7 of the letter to the holders of Trustees' Participation shares, dated July 19, 1929.

94. That on September 25, 1929, the BancoKentucky Company agreed to purchase capital stocks of the Brighton Bank & Trust Company at Cincinnati, Ohio, a banking corporation organized under the laws of the State of Ohio, and the Pearl Market Bank & Trust Company of Cincinnati, Ohio, a banking corporation organized under the laws of the State of Ohio, in accordance with the offer of purchase set forth in the Minutes of the BancoKentucky Company of September 27, 1929. Subsequently 47,854 shares out of 60,000 shares of the capital stock of the Pearl Market Bank & Trust Company were acquired by the BancoKentucky Company in exchange for 54,936 shares of stock of BancoKentucky Company and \$2,200,388.30 paid in cash. The BancoKentucky Company also acquired 44,390 shares out of 50,000 shares of the capital stock of the Brighton Bank & Trust Company in exchange for 31,459 shares of BancoKentucky Company stock and \$3,323,409.90 in cash.

95. That for the purpose of this case, it is stipulated and agreed that the Court may take judicial notice of the statute laws and decisions of the States of Ohio, Indiana, Delaware, Tennessee, Arkansas, and Kentucky, and the parties may call to the Court's attention any provisions of said laws deemed pertinent.

96. That on November 22, 1929, the BancoKentucky Company Board of Directors approved the acquisition of capital stock of Central Savings Bank & Trust Company,

Plaintiff's Evidence

Covington, Kentucky, a Kentucky banking corporation and, in December, 1929, Banco Kentucky Company acquired 548 shares of said stock, out of a total issue of 600 shares (par value \$100.00) for \$329,372.51 in cash.

97. That on January 10, 1930, the Banco Kentucky Company Board of Directors approved the acquisition of capital stock of Peoples Liberty Bank & Trust Company, Covington, Kentucky, a Kentucky banking corporation and, from December 29, 1929, to November 21, 1930, Banco Kentucky Company acquired 2,099 shares of said stock, out of a total issue of 6,500 shares (par value \$100.00) for \$491,136.50 in cash.

98. That on March 7, 1930, the Banco Kentucky Company Board of Directors approved the acquisition of capital stock of First National Bank of Paducah, Kentucky, a national banking association, and, on June 30, 1930, Banco Kentucky Company acquired 6,925 shares of said stock out of a total issue of 7,500 (par value \$20.00) by exchanging 24,930 shares of Banco Kentucky Company stock therefor.

99. That on March 27, 1930, the Banco Kentucky Company Board of Directors approved the acquisition of capital stock of Ashland National Bank, Ashland, Kentucky, a national banking association, and from May 16, to September 18, 1930, Banco Kentucky Company acquired 7,125 shares of said stock, out of a total issue of 8,000 shares (par value \$100.00) by exchanging 56,920 shares of Banco Kentucky Company stock and \$37.50 in cash therefor.

100. That on March 27, 1930, the Banco Kentucky Company Board of Directors approved the acquisition of capital stock of the Security Bank of Louisville, Kentucky, a Kentucky banking corporation and, from April to October, 1930, Banco Kentucky Company acquired 2,713 shares of stock out of a total issue of 3,000 shares (par value \$100.00) by exchanging 29,294 shares of stock of Banco Kentucky Company and paying \$217,200.00 in cash therefor.

Plaintiff's Evidence

101. That on September 19, 1930, the BancoKentucky Company Board of Directors approved the acquisition of capital stock of the Mechanics Trust & Savings Bank, Paducah, Kentucky, a Kentucky banking corporation and BancoKentucky Company on said day acquired 575 shares of said stock, out of a total issue of 1,000 shares (par value \$100.00) by exchanging 5,175 shares of BancoKentucky Company stock therefor.

102. That the aggregate par value of the bank stocks held by the BancoKentucky Company, November 17, 1930, was \$7,770,780.00.

Paragraphs 90 through 102, inclusive, are admitted to be correct in the response filed by the defendant.

Exs. 65, 65-A, 65-B

103. "Exhibits 85, 65-A and 65-B" are the original General Ledger, Cash Journal and Stock Securities Record of BancoKentucky Company containing the original entries.

This paragraph was admitted and the exhibits were received in evidence.

104. That the note of the Murray Rubber Company purchased by the BancoKentucky Company from the National Bank of Kentucky for a cash consideration of \$580,000.00 on October 24, 1930, was, at the time of its purchase and ever since has been worthless.

In the response defendants admitted Paragraph 104 except that they denied that the note referred to at the time of its purchase or at any time prior to November 17, 1930, was worthless, for the reason that said company was operating at said time and there was no reason to anticipate that said note did not have real value.

105. That the participation in the note of Lewis C. Humphrey, purchased by the BancoKentucky Company from the National Bank of Kentucky on October 24, 1930, for \$20,000.00, was at the time of its purchase, and ever since has been, worthless.

Plaintiff's Evidence

In the response defendants admitted Paragraph 105 but denied that the note referred to therein, at the time of its purchase, or at any time prior to November 17, 1930, was worthless at said time and there was no reason to anticipate that said note did not have real value.

106. That the note of James B. Brown, President of the National Bank of Kentucky and the BancoKentucky Company, dated November 14, 1929, due in six months, payable to Wakefield & Company for the face value of \$2,000,000.00, was acquired by the BancoKentucky Company from Wakefield & Company on November 13, 1929, for a cash consideration of \$2,000,000.00 and had attached thereto as collateral security 60,000 shares of the BancoKentucky Company stock and only 22,500 shares of the Standard Oil Company of Kentucky stock. No interest was ever paid on this note.

This paragraph was admitted by the defendants in the response. A copy of the note was received in evidence as Exhibit 65 (c). It is not reproduced but can be found with the original exhibits.

107. That nothing was realized from said BancoKentucky Company stock held as collateral and the stock of the Standard Oil Company of Kentucky was sold for \$442,580.75 and applied on the note. The maker of the note, James B. Brown, filed a voluntary petition in bankruptcy on December 23, 1930. No dividends were paid in said bankruptcy proceeding and the bankrupt was duly discharged. Mrs. A. E. Latta did business under the assumed name "Wakefield & Company," and was the sole proprietor of said business. Mrs. A. E. Latta made an assignment for the benefit of her creditors on the 1st day of July, 1931. No cash dividends were paid and the property so assigned has had and has only a nominal value.

Plaintiff's Evidence

This paragraph was admitted in the response except that defendants denied that the property assigned by Mrs. A. E. Latta has had and has only a nominal value.

108. That on December 17, 1929, BancoKentucky Company acquired 625 shares of stock of the Union Central Life Insurance Company for \$25,000.00 paid in cash. Said stock was sold by the Receiver of BancoKentucky Company for \$21,560.51.

109. That from March 24, 1930, to August 7, 1930, the BancoKentucky Company purchased and retired 106,000 shares of its own capital stock at a cost to said Company of \$2,374,137.50. Said purchases were made on behalf of the BancoKentucky Company by Wakefield & Company on the open market.

110. That the BancoKentucky Company became indebted on November 4, 1929, to the Chemical Bank & Trust Company on account of borrowed money in the sum of \$1,000,000.00. Said loan was paid off on January 22, 1930, and subsequently, on June 14, 1930, a further loan of \$1,000,000.00 was obtained from said Chemical Bank & Trust Company and on October 22nd said loan was increased to the further sum of \$600,000.00, making a total of \$1,600,000.00 due and owing by the BancoKentucky Company to the Chemical Bank & Trust Company of New York on November 17, 1930. There was pledged to the Chemical Bank, as security for said loan, the following:

26,000 shares of Brighton Bank & Trust Company stock;

24,284 shares of Pearl Market Bank & Trust Company stock;

60,320 shares Trustees' Participation Certificates, National Bank of Kentucky-Louisville Trust Company;

2,713 shares Security Bank stock;

22,500 shares Standard Oil of Kentucky stock;

Plaintiff's Evidence

Said 22,500 shares of Standard Oil of Kentucky was collateral to the note of James B. Brown and was repledged with the Chemical Bank & Trust Company.

Ex. 66.

111. "Exhibit 66" is an authentic copy of the voluntary petition filed November 24, 1930, in the Jefferson Circuit Court of Louisville, Kentucky, by the Executive Committee of the Board of Directors of the BancoKentucky Company for the appointment of a receiver.

Ex. 67

"Exhibit 67" is an authentic copy of the answer filed by BancoKentucky Company, confessing the allegations of the petition. Joseph S. Laurent was appointed Receiver, in accordance with the prayer of said petition.

Paragraphs 108 through 111, inclusive, were admitted in the response. The two exhibits referred to in Paragraph 111 were received in evidence.

112. That thereafter proceedings were had in an action commenced by Paul C. Keyes, Receiver of the National Bank of Kentucky v. Joseph S. Laurent, Receiver of the BancoKentucky Company, as set forth in Paragraph XIX of the Bill of Complaint, resulting in the allowance of a claim against the Receiver of said BancoKentucky Company for the sum of \$3,772,162.40 and \$331,320.97 as interest from April 1, 1931, to the date of judgment, September 14, 1932. From the time of his appointment as Receiver, on November 24, 1930, to date, the only payment made by said Receiver of the BancoKentucky Company to the Receiver of the National Bank of Kentucky was \$90,745.17. Except for said credit, the amount due and owing the Receiver of the National Bank of Kentucky, on account of said claim, is wholly unpaid and unsatisfied.

113. That on December 13, 1929, the National Bank of Kentucky declared a quarterly dividend of \$4.00 per share.

Plaintiff's Evidence

On the same day the Louisville Trust Company declared a quarterly dividend of \$4.00 per share. On the same day the BancoKentucky Company declared a quarterly dividend of 20¢ per share. All of the foregoing dividends were payable January 2, 1930, and were paid on that date.

114. That on March 14, 1930, the National Bank of Kentucky declared a quarterly dividend of \$4.00 per share. On the same day the Louisville Trust Company declared a quarterly dividend of \$4.00 per share, and on March 21, 1930, the BancoKentucky Company declared a quarterly dividend of 20¢ per share. All three dividends were payable April 1, 1930, and were paid on that date.

115. That on June 13, 1930, the Louisville Trust Company declared a quarterly dividend of \$4.00 per share. On June 18, 1930, the BancoKentucky Company declared a quarterly dividend of 20¢ per share. On June 20, 1930, the National Bank of Kentucky declared a quarterly dividend of \$4.00 per share. All three dividends were payable July 1, 1930, and were paid on that date.

116. That on September 12, 1930, the Louisville Trust Company declared a quarterly dividend of \$4.00 per share. On September 19, 1930, the National Bank of Kentucky declared a quarterly dividend of \$4.00 per share and on the same day the BancoKentucky Company declared a quarterly dividend of 20¢ per share; all three dividends were payable on October 1, 1930, and were paid on that date.

Paragraphs 112 through 116, inclusive, were admitted to be correct in the response.

117. That the dividends on the stock of the National Bank of Kentucky and the Louisville Trust Company, held by the Trustees of record were paid by the Bank in one check payable to said Trustees, and on the same day said Trustees, without any deduction for expenses or otherwise, paid out the entire sum received by them to the holders of

Plaintiff's Evidence

Trustees' Participation Certificates, making the one check for its proportionate share of said dividend to the Banco-Kentucky Company, as the holder of approximately 95% of the Trustees' Participation Certificates. The Banco-Kentucky Company in turn, on the same day, paid its dividend. Ex. 68.

"Exhibit 68" is a schedule and an analysis showing the receipt of all dividends and other income by the Banco-Kentucky Company during its existence, and the disbursement thereof, all taken from its books and records.

Ex. 69.

118. Exhibit 69 is a summary of dividends received by the Trustees from the National Bank of Kentucky and the Louisville Trust Company and the payment of said dividends out to the holders of Trustees' Participation Certificates.

Defendants admitted paragraphs 117 and 118 in their response except in so far as Exhibit 68 was concerned. Exhibit 68 was admitted in evidence in connection with the testimony of Hugh A. White, the accountant who prepared it. Exhibit 69 was also received in evidence.

119. That the BancoKentucky Company paid no salaries to its officers. It had no salaried employees. It paid no fees to Directors. It had no office. It never complied with the laws of Kentucky applicable to foreign corporations. The only books and records kept by the BancoKentucky Company were a General Ledger, Cash Journal, Minutes of Directors and a record of payments for stock subscriptions. Said books and records were kept by employees of the National Bank of Kentucky under the supervision of W. T. ZurSchmiede, Auditor of the National Bank of Kentucky during 1929, and Cashier of the National Bank of Kentucky during 1930, and at the same times Secretary and Treasurer of the BancoKentucky Company. The Banco-

Plaintiff's Evidence

Kentucky Company files and its correspondence was intermingled with the correspondence of the National Bank of Kentucky.

Defendants admitted the correctness of paragraph 119 in their response except that they denied that BancoKentucky Company had no office; denied, for want of information sufficient to form a belief that BancoKentucky Company's files and its correspondence were intermingled with the correspondence of the National Bank of Kentucky; defendants admitted that BancoKentucky Company paid no salaries, but defendants stated that claims for salaries had been filed with the Receiver of the BancoKentucky Company.

In connection with this paragraph plaintiff offered in evidence affidavit of the Chief Deputy in the office of the Secretary of State of Kentucky to the effect that no reports had been filed by BancoKentucky Company as required by Section 571, Kentucky Statutes. This affidavit was received in evidence as Exhibit 69(a).

An affidavit of the Supervisor of the filing section of the Department of Revenue of the State of Kentucky to the effect that no reports as required by Section 4189-2, Kentucky Statutes, had been filed by BancoKentucky; was received in evidence as Exhibit 69(b).

Mr. Crawford denied the competency of the testimony with regard to the failure to comply with the laws of Kentucky as against people other than the derelict officers. An objection was also made to Exhibits 69(a) and 69(b).

120. That on May 28, 1930, BancoKentucky Company and Caldwell & Company, a Tennessee corporation, entered into a contract for the exchange of 900,000 shares of BancoKentucky Company stock for 10,000 shares of Caldwell & Company stock, on certain conditions. By a supplemental contract between said parties, Caldwell & Company agreed

Plaintiff's Evidence

to, and did deliver 100,000 shares of said 900,000 shares of BancoKentucky Company stock to The National Bank of Kentucky. Caldwell & Company also deposited 200,000 shares of said BancoKentucky Company stock with The Louisville Trust Company in escrow, pending the determination of the value of Caldwell & Company, under the terms of said contract of May 28, 1930. On September 8, 1930, Caldwell & Company deposited an additional 200,000 shares of said BancoKentucky Company stock with The Louisville Trust Company in escrow, pending the determination of the value of Caldwell & Company, under the terms of said contract.

121. That in said contract of May 28, 1930, Caldwell & Company represented that it had a net worth of \$9,000,000.00. Caldwell & Company owned all of the stock of the Bank of Tennessee and had controlling or substantial interests in the following banks:

Fourth & First National Bank, Nashville, Tennessee
 Holston-Union National Bank, Knoxville, Tennessee
 Union Planters National Bank & Trust Co., Memphis, Tennessee

Manhattan Savings Bank & Trust Company, Memphis, Tennessee

Exchange National Bank, Little Rock, Arkansas
 Nashville Trust Company, Nashville, Tennessee
 American Bank & Trust Company, Lebanon, Tennessee
 Alexandria Bank & Trust Company, Alexandria, Tennessee

South Knoxville Bank, Knoxville, Tennessee
 Holston Trust Company, Knoxville, Tennessee

and owned approximately 66 $\frac{2}{3}$ % of the Inter-Southern Life Insurance Company. Inter-Southern Life Insurance Company owned approximately 30% of the Missouri State Life

Plaintiff's Evidence

Insurance Company, and Missouri State Life Insurance Company owned a controlling interest in the Southwestern Life Insurance Company, Texas.

122. That the quarterly dividends paid July 1 and October 1, 1930, on stock of the Banco Kentucky Company were not paid on the stock issued and outstanding in the name of Caldwell & Company, as the valuations contemplated by the contract had not been made. No dividend was paid on the 100,000 shares of Banco Kentucky Company stock delivered by Caldwell & Company to the National Bank of Kentucky, nor did Caldwell & Company purchase from the National Bank of Kentucky the Kentucky Wagon Manufacturing Company and National Motors Corporation obligations as provided in said supplemental contract. 10,000 shares of stock of Caldwell & Company representing 50% of the stock of said company, were issued to the Banco Kentucky Company. The firm of Price Waterhouse Company, Certified Public Accountants, completed an audit of Caldwell & Company on November 30, 1931, as of May 31, 1930. That audit shows that on May 31, 1930, Caldwell & Company was insolvent to the extent of \$1,111,170.33 and that the stock was wholly worthless on said date.

Defendants in their response admitted paragraph 122 except that they denied that Caldwell & Company did not complete the purchase of the Kentucky Wagon Company and National Motors Corporation obligations from the National Bank of Kentucky because said sale was completed.

The words in this paragraph "said stock was wholly worthless" were admitted subject to examination of the audit referred to in the paragraph by defendants' attorneys.

Defendants admitted that the audit was made as of the date set forth.

123. Caldwell & Company was placed in the hands of a Clearing House Committee on November 6, 1930, and a re-

Plaintiff's Evidence

ceiver was appointed for said Company on November 14, 1930, by the United States District Court at Nashville, Tennessee, on the filing of a Creditors' Bill. The creditors of said Company have received a final liquidating dividend of less than one tenth of one per cent.

Defendants admitted this paragraph.

Ex. 71

124. "Exhibit 71" is a photostatic copy of the Application filed by BancoKentucky Company with the Louisville Stock Exchange to list its stock.

Ex. 72

125. "Exhibit 72" is a photostatic copy of the original letter sent by the BancoKentucky Company, signed by W. T. ZurSchmiede, Secretary and Treasurer, to the Chicago Stock Exchange, dated March 19, 1930.

Ex. 73

126. "Exhibit 73" is a correct photostatic copy of the original answers to the Questionnaire of the Chicago Stock Exchange, in re: BancoKentucky Company, signed by BancoKentucky Company by W. T. ZurSchmiede, Secretary and Treasurer, to which is attached a photostatic copy of the letter to the Chief Examiner of the Chicago Stock Exchange transmitting said Questionnaire to BancoKentucky Company.

Ex. 74

127. "Exhibit 74" is a correct photostatic copy of the original Application to list the stock of the BancoKentucky Company on the Chicago Stock Exchange, signed by James B. Brown, its President.

Ex. 75

128. "Exhibit 75" is a correct photostatic copy of the letter sent by the Chicago Stock Exchange to W. T. ZurSchmiede, Secretary of BancoKentucky Company under date of October 2, 1929, advising that the stock of the BancoKentucky Company was admitted to trading upon the Chicago Stock Exchange.

Plaintiff's Evidence

129. That the stock of the BancoKentucky Company was listed on the Chicago Stock Exchange and on the Louisville Stock Exchange and trades in said stock were made upon both of said Exchanges.

Paragraphs 124 through 129, inclusive, were admitted in the response and the exhibits referred to were received in evidence.

Ex. 76

130. "Exhibit 76" is the original printed Statement of the BancoKentucky Company signed by J. B. Brown, President, addressed to the shareholders and dated March 10, 1930. This Statement was sent to some stockholders and to the Chicago Stock Exchange.

Paragraph 130 was admitted in the response but defendants denied that the statement was sent to over 15 or 20 stockholders at most. The exhibit referred to was received in evidence.

Ex. 77

131. "Exhibit 77" is a Schedule, showing the names of the Directors of the National Bank of Kentucky from January 11, 1927, to November 17, 1930, the Louisville Trust Company from January 11, 1927, to November 17, 1930, and the BancoKentucky Company from July 16, 1929, to November 22, 1930.

Ex. 78

132. "Exhibit 78" is a photostatic copy of the original letter of July 22, 1930, from John S. Wood, Federal Reserve Agent of the Federal Reserve Bank of St. Louis, to W. T. ZurSchmiede, National Bank of Kentucky, submitting schedule of information on group banking from the files of said bank.

Ex. 79

133. "Exhibit 79" is the certificate of L. P. Bethea, Assistant Secretary of the Board of Governors of the Federal Reserve System and attached papers thereby certified.

*Plaintiff's Evidence***Ex. 80**

134. "Exhibit 80" is a photostatic copy of the letter of Caldwell & Company to the BancoKentucky Company, submitting information for the Federal Reserve Board in connection with the Questionnaire.

Ex. 81

135. "Exhibit 81" is a photostatic copy of the original letter from Maurice L. Galvin received by Charles F. Jones, dated February 21, 1931, from the files of BancoKentucky Company.

Ex. 82

136. "Exhibit 82" is a true and correct carbon copy of the reply thereto, dated February 24, 1930, from the files of Banco.

Ex. 83

137. "Exhibit 83" is a photostatic copy of the original letter from Maurice L. Galvin, received by BancoKentucky Company dated April 15, 1930, from the files of Banco.

Ex. 84

138. "Exhibit 84" is a true and correct carbon copy of the reply thereto, dated April 16, 1930, from Banco files.

Ex. 85

139. "Exhibit 85" is a copy of the original letter from Maurice L. Galvin received by BancoKentucky Company, dated October 17, 1930, from Banco files.

Ex. 86

140. "Exhibit 86" is a true and correct carbon copy of a letter sent by James B. Brown, President, to Jesse Weil, Vice President, First National Bank, Paducah, Kentucky, dated March 7, 1930, with reference to exchange of Banco-Kentucky stock for stock of the First National Bank of Paducah, from files of National Bank of Kentucky.

Ex. 87

141. "Exhibit 87" is the original letter from John E. Buckingham, President of the Ashland National Bank, re-

Plaintiff's Evidence

ceived by James B. Brown, President of the Banco Kentucky Company, dated March 31, 1930, with printed notice sent to the stockholders of the Ashland National Bank attached, from National Bank of Kentucky files.

Ex. 88

142. "Exhibit 88" is a photostatic copy of the original letter from John E. Buckingham, President of the Ashland National Bank, received by James B. Brown, President of National Bank of Kentucky, dated November 5, 1930, from the files of said bank.

Ex. 89

143. "Exhibit 89" is a true and correct copy of a letter sent to the stockholders of the Security Bank, dated April 3, 1930, with reference to the exchange of Security Bank stock for Banco Kentucky Company shares, from files of National Bank of Kentucky.

Ex. 90

144. "Exhibit 90" is a photostatic copy of correspondence, consisting of twelve letters, exchanged between Maurice L. Galvin and Charles F. Jones and W. T. ZurSchmiede, with reference to Directors qualifying shares in the Pearl Market Bank & Trust Company and Brighton Bank & Trust Company, from the files of the Banco Kentucky Company.

Ex. 91

145. "Exhibit 91" is a photostatic copy of a letter from G. M. Mosler, President of the Brighton Bank & Trust Company, received by the Banco Kentucky Company, dated April 1, 1930, and a true and correct copy of the reply thereto signed by W. T. ZurSchmiede, Secretary and Treasurer of Banco Kentucky Company, dated April 2, 1930, from Banco files.

Ex. 92

146. "Exhibit 92" is a true and correct copy of a letter from W. T. ZurSchmiede, Secretary & Treasurer of Banco Kentucky Company, received by Joseph A. Helmers, Execu-

Plaintiff's Evidence

tive Vice President of the Pearl Market Bank & Trust Company, dated January 14, 1930, from files of National Bank of Kentucky.

Ex. 93

147. "Exhibit 93" is a true and correct copy of a letter from W. T. ZurSchmiede, dated April 11, 1930, to P. Lincoln Mitchell, from Banco files.

Ex. 94

148. "Exhibit 94" is a true and correct copy of a letter from ZurSchmiede to John W. Lewis, dated April 11, 1930, from National Bank of Kentucky files.

Ex. 95

149. "Exhibit 95" is a photostatic copy of letter from Humbert Baer, Assistant Cashier of Pearl Market Bank & Trust Company to the BancoKentucky Company, dated January 17, 1930, from Banco files.

Ex. 96

150. "Exhibit 96" is an original letter from Richard Bean, President of the Louisville Trust Company to Charles F. Jones or John Akers, National Bank of Kentucky, dated February 1, 1929, from files of said bank.

Ex. 97

151. "Exhibit 97" is a true and correct original copy found in the files of the National Bank of Kentucky of Market letter of E. W. Hays & Company, dated October 20, 1929.

Ex. 98

152. "Exhibit 98" is a photostatic copy of the original letter from Chicago Statistics to the BancoKentucky Company with statistical sheet attached, from Banco files.

Ex. 99

153. "Exhibit 99" is a photostatic copy of clipping from Paris, France, Edition of the New York Herald, found in the files of the Bank and bearing initials of Tom ZurSchmiede, Secretary and Treasurer of BancoKentucky Company.

*Plaintiff's Evidence***Ex. 100**

154. "Exhibit 100" is a photostatic copy of a letter from Chicago Statistics Company, dated January 31, 1930, addressed to BancoKentucky Company with statistical sheet attached, from Banco files.

Ex. 101

155. "Exhibit 101" is a photostatic copy of the "Round-Up" financial publication, Forest Park, Illinois, March 18, 1930, found in the files of BancoKentucky Company.

Ex. 102

156. "Exhibit 102" is a photostatic copy of original letter from Baron's National Financial Weekly, Boston, dated April 3, 1930, addressed to BancoKentucky Corporation, and reply thereto to W. T. ZurSchmiede, Secretary and Treasurer of BancoKentucky Company dated April 8, 1930, from Banco files.

Ex. 103

157. "Exhibit 103" is the true and original letter of Rogers Caldwell to James B. Brown, President of the National Bank of Kentucky, dated January 29, 1930, from files of said bank.

Ex. 104

158. "Exhibit 104" is a true and correct carbon copy of a letter from W. T. ZurSchmiede, Cashier, National Bank of Kentucky, dated August 14, 1930, addressed to Caldwell & Company, enclosing dividend check for \$180,000.00, from files of said bank.

Ex. 105

159. "Exhibit 105" is an original letter of Caldwell, advising of the return of said check, dated September 4, 1930, from files of said bank.

Ex. 106

160. "Exhibit 106" is a true and correct carbon copy of a letter from ZurSchmiede, dated September 5, 1930, acknowledging the return of said check, from files of said bank.

*Plaintiff's Evidence***Ex. 107**

161. "Exhibit 107" is a photostatic copy of a letter from Ralph Bullick, dated April 3, 1930, to BancoKentucky Company, from Banco files.

Ex. 108

162. "Exhibit 108" is a photostatic copy of the reply thereto by W. T. ZurSchmiede, Secretary of BancoKentucky Company, dated April 7, 1930, from Banco files.

Ex. 109

163. "Exhibit 109" is a photostatic copy of the Income Tax Return of the BancoKentucky Company for the year 1929.

Ex. 110

164. "Exhibit 110" is a photostatic copy of original letter from First National Bank, Boston Corporation, dated December 7, 1929, addressed to the Secretary and Treasurer of BancoKentucky Company, and carbon copy of letter of W. T. ZurSchmiede, Secretary and Treasurer of the BancoKentucky Company in reply thereto, dated December 11, 1929, from Banco files.

Ex. 111

165. "Exhibit 111" is a photostatic copy of the original letter from the Greenhall Company, Inc., New York, dated December 2, 1929, addressed to the BancoKentucky Company; and carbon copy of the reply of the Secretary and Treasurer of the BancoKentucky Company thereto, dated December 9, 1929, from Banco files.

Ex. 112

166. "Exhibit 112" is a photostatic copy of the original letter of J. Frank Hutcheson, addressed to BancoKentucky Company, dated December 6, 1929; and carbon copy of reply thereto by W. T. ZurSchmiede, Secretary and Treasurer of BancoKentucky Company, dated December 11, 1929, from Banco files.

Plaintiff's Evidence

Ex. 113

167. "Exhibit 113" is a photostatic copy of the original letter, dated October 13, 1929, from Hugh Rodman, Oklahoma City, Oklahoma, addressed to Banco Kentucky Company; and carbon copy of reply thereto of W. T. ZurSchmiede, Secretary and Treasurer of Banco Kentucky Company, dated October 21, 1929, from Banco files.

Ex. 114

168. "Exhibit 114" is a photostatic copy of the original letter of Milton E. Reiner & Company, New York, dated October 14, 1929, and carbon copy of reply thereto by W. T. ZurSchmiede, Secretary and Treasurer of Banco Kentucky Company, dated October 22, 1929, from Banco files.

Ex. 115

169. "Exhibit 115" is a true and correct copy of a letter written by Chas. F. Jones, Vice President of National Bank of Kentucky to T. A. Field, Vice President of Ashland National Bank, Ashland, Kentucky, dated August 25, 1930, from National Bank of Kentucky files.

Paragraphs 131 through 179, inclusive, was admitted in the response and the exhibits referred in those paragraphs were admitted in evidence.

Ex. 116

170. "Exhibit 116" is a true and correct tabulation made from the books and records of the National Bank of Kentucky of the quarterly earnings and quarterly dividends of the National Bank of Kentucky from June 30, 1927, to September 30, 1930.

Paragraph 170 was denied in the response. The exhibit was received in evidence in connection with the testimony of Hugh A. White, the accountant who prepared the same.

Ex. 117

171. "Exhibit 117" is a true and correct tabulation made from the books and records of the National Bank of Kentucky of the borrowed money position of the National Bank

Plaintiff's Evidence

of Kentucky from January 1, 1929, to the close of the National Bank of Kentucky.

Ex. 118

172. "Exhibit 118" is a true and correct tabulation made from the books and records of the National Bank of Kentucky of the legal reserve position of the National Bank of Kentucky from January 1, 1929, to November 16, 1930.

173. That James B. Brown was a director of each of the banks and trust companies stock of which was registered in the names of the Trustees under Trust Agreement of April 22, 1927, of Banco Kentucky Company.

174. That each director of each bank or trust company, stock of which was registered in the names of Trustees or Banco Kentucky Company, took the form of directors' oath prescribed by the laws under which said banks or trust companies were organized.

Paragraphs 171 through 174, inclusive, were admitted in response and the exhibits referred to were received in evidence.

Ex. 120

175. "Exhibit 120" is a computation of the assessment.

Paragraph 175 was denied but the exhibit was received in evidence in connection with the testimony of Hugh A. White, the accountant who prepared it.

176. That the Receiver of the National Bank of Kentucky, on March 20, 1931, paid depositors in said Bank a dividend of 67% of their claims. The Receiver has paid no further dividend.

Ex. 121

177. "Exhibit 121" is a photostatic copy of National Bank of Kentucky published Call Reports, appearing in the Herald-Post, Louisville, Kentucky, on April 8, 1929, July 11, 1929, October 18, 1929, January 15, 1930, April 9, 1930, July 11, 1930 and October 11, 1930.

*Plaintiff's Evidence***Ex. 122**

178. "Exhibit 122" is an attested photostatic copy of the Answer of the Louisville Trust Company, and the Receiver thereof to the Intervening Petition of Annie Bullitt Brewer, filed March 25, 1931, in Jefferson County, Kentucky, Circuit Court Case No. 205178.

Ex. 123

179. "Exhibit 123" is an attested photostatic copy of the Answer of the Louisville Trust Company to the Amended Petition of the Trustee under the will of Frank A. Menne, deceased, in said Jefferson Circuit Action No. 205178 on December 21, 1931.

Ex. 124

180. "Exhibit 124" is a true and correct tabulation of loans made by National Bank of Kentucky to pay subscriptions for BancoKentucky Company stock from September 25, 1929, to November 7, 1929.

Ex. 126

181. "Exhibit 126" is a true and correct tabulation of the assets acquired by BancoKentucky Company and condensed Statement of Cash Receipts and Disbursements from September 25, 1929, to November 22, 1930.

182. "Exhibit 127" is a true and correct tabulation of dividends declared by National Bank of Kentucky, Louisville Trust Company, and BancoKentucky Company subsequent to October 2, 1929.

Paragraphs 176 to 182, inclusive, were admitted to be correct in the response and the exhibits referred to were admitted in evidence.

Ex. 128

183. "Exhibit 128" is a certified copy of the Annual Report of BancoKentucky Company filed in the office of the Secretary of the State of Delaware, January 7, 1930.

Ex. 129

184. "Exhibit 129" is a certified copy of the Annual Report of BancoKentucky Company filed in the office of the

Earl R. Muir

Secretary of the State of Delaware, December 31, 1930.

Paragraphs 183 and 184. were not admitted but the exhibits referred to were offered in evidence and received by the court.

Earl R. Muir,

called for Plaintiff, testified as follows:

I have been connected with the Louisville Trust Company since its reorganization and have been President since November, 1937. The Louisville Trust Company failed to open on November 17, 1930, and The Fidelity and Columbia Trust Company, a Louisville bank, was appointed receiver. It continued to act until August 24, 1931. A 100% stock assessment amounting to \$1,750,000.00 was levied and a claim in that amount was allowed against the Banco-Kentucky Company. Some of the depositors of the Louisville Trust Company, those that did not consent to the plan of reorganization, received 100% of their deposit in cash on opening date in August, 1931. Those owning \$10,000.00—between 90% and 95% of the Bank's assets—received 20% in cash on the opening date; 5% in ninety days; 5% in six months; 5% in a year and 20% in two years, a total of 55%. They also received in stock of the reorganized Louisville Trust Company 15% of their deposit, and they received a depositor's refunding certificate representing 30% of what they had in the bank. Nothing has been paid on the refunding certificates. The refunding certificates were payable out of the undesirable assets of the bank. The total cash realized was 55% plus such amounts as might have been realized through sale of the stock, which has ranged in the market price from \$3.50 a share to \$18.00 a share. At the present time, November 2, 1938, stock is selling at \$7.00 per share. In the reorganization of Louisville Trust Company the same corporate entity was re-

Fred W. Gates

tained, and the Trust Company still operates under the same charter. However, it has a different set of stockholders. It took over only the desirable assets. For all practical purposes the present Louisville Trust Company is a new bank.

Cross-examination by Mr. Dodd

The Louisville Trust Company, as of November 17, 1930, owned the real estate on the southwest corner of Fifth and Market Streets, and it has now been determined that it owned the building at 421 West Market Street. As of opening date, August 24, 1931, there were outstanding \$9,956,000.00 of 5½% collateral trust notes which were secured by real estate mortgages. There was a substantial decline in the value of real estate securing those bonds as a result of the depression of 1929, which reached such proportions, that during the past several years the Trust Company had to foreclose and acquired a substantial amount of the real estate on which the Trust Company was obliged to take substantial losses before a sale could be effected. This fact was taken partly into consideration when the amount paid depositors was considered in the reorganization. A reserve against real estate of something in excess of \$1,000,000.00 was set up in the plan of reorganization.

Fred W. Gates,

called for Plaintiff, testified as follows:

I was Vice-President of the old Louisville Trust Company prior to the reorganization.

Witness produced the minute book of the Board of Directors of Louisville Trust Company from April, 1911, to August 15, 1931, and plaintiff offered in evidence each of the minutes for the period subsequent to January 1, 1927

Fred W. Gates

and up to August 15, 1931. The exhibit was admitted in evidence, over the objection of the defendants, as Exhibit No. 130. (see original exhibits—2 volumes).

Witness also produced the following exhibits, all of which were introduced over the objection of defendants:

Exhibit No. 131—Minutes of the Executive Committee of Louisville Trust Company from January 24, 1930, to November 7, 1930. (See original exhibits.)

Exhibit No. 132—Minutes of Executive Committee of Louisville Trust Company from May 15, 1924, to April 25, 1927. (See original exhibits.)

Exhibit No. 133—Minutes of Executive Committee of Louisville Trust Company from May 2, 1927, to May 13, 1929. (See original exhibits.)

Exhibits Nos. 134-1 and 134-2—Letter on the stationery of Miller and Chevalier, signed by this firm and Robert F. Vaughan, addressed to James B. Brown and Richard Bean, dated August 2, 1929, with enclosure, being copy of communication from the Deputy Commissioner of Internal Revenue to Miller and Chevalier, dated July 30, 1929.

Exhibit No. 134-3—Copy of letter addressed to Thomas L. Barrett, dated September 9, 1929, and notation on reverse side.

Exhibit No. 134-4—Copy of memorandum from Richard Bean on the BancoKentucky Company, dated November 4, 1929.

Exhibit No. 134-5—Copy of memorandum, on the letterhead of Louisville Trust Company, from Richard Bean on BancoKentucky Company, dated November 4, 1929.

Exhibit No. 134-6—Copy of letter from Louisville Trust Company to BancoKentucky, dated January 29, 1930.

Exhibit No. 134-7—Copy of letter from Louisville Trust Company to J. S. Akers, Secretary of the Trustees, dated August 3, 1929.

Exhibit No. 134-8—Letter from Banco to its stockholders, dated December 31, 1929, with proxy.

Fred W. Gates

Exhibit No. 134-9—Five letters relative to exchange of T.P.C.'s for Banco by Mrs. Emma Robbins.

Exhibit No. 134-10—Copy of letter from Louisville Trust Company to Banco, dated October 14, 1929, with copy of letter from T. K. Helm to J. W. Cammack, Attorney General of Kentucky, dated January 11, 1928.

Exhibit No. 134-11—Letter from Robert F. Vaughan and others to Louisville Trust Company, dated July 24, 1929.

Exhibit No. 134-13—Copy of letter from Robert F. Vaughan to James B. Brown, dated July 9, 1929, together with enclosure headed "Suggested Preface to the Prospectus."

Exhibit No. 134-14—Copy of letter from Vaughan to James B. Brown, dated July 6, 1929.

Exhibits Nos. 135 and 135-1—Dividend check register from January 1, 1927, to January 1, 1931, of the Trustees under the agreement of April 22, 1927. (See original exhibits.)

Exhibit No. 136—Deposit account records with the Louisville Trust Company from January 1, 1927, to January 1, 1931, of the Trustees under the agreement of April 22, 1927. (See original exhibits.)

Exhibits Nos. 137-1a and 137-1b—Dividend check register of the BancoKentucky Company. (See original exhibits.)

Exhibit No. 137-2—Deposit account records of the BancoKentucky Company with Louisville Trust Company. (See original exhibits.)

Exhibits Nos. 138 and 138-1—Dividend check register of Louisville Trust Company from January 1, 1927, to January 1, 1931. (See original exhibits.)

Exhibits Nos. 139-1 and 139-2—Louisville Trust Company liability records showing all loans made on security or BancoKentucky Company stock and/or to pay subscriptions for BancoKentucky Company stock from September 20, 1929, through November 15, 1929. (Original exhibits.)

Fred W. Gates

Exhibit No. 140—Daily statement register January 1, 1929, to January 3, 1931. (See original exhibit.)

Exhibits Nos. 141 and 141-1—General ledger Louisville Trust Company, January 1, 1927, through November 16, 1930. (See original exhibits.)

Exhibit No. 142—General ledger of Louisville National Bank and Trust Company from January 1, 1929, to merger with Louisville Trust Company. (See original exhibits.)

Exhibit No. 143—Louisville Trust Company records of transfer of Banco Kentucky Company stock. (See original exhibits.)

Exhibit No. 144—Louisville National Bank and Trust Company directors' minutes from January 1, 1929, to merger with Louisville Trust Company. (See original exhibits.)

Exhibits Nos. 145-1 and 145-2—Stockholders' minutes of the old Louisville Trust Company from January 1, 1927, to December 1, 1930. (See original exhibits.)

Cross-examination by Mr. Dodd

I became connected with the Louisville Trust Company in September, 1912, as a runner and have gone through practically all the cages in the bank, tellers' cages, note cages and trust department. My first official capacity was assistant treasurer, then treasurer, then assistant vice-president. On the reorganization I became secretary of the company.

Q. Did you know or believe that Louisville Trust Company was insolvent, or that its insolvency was impending in any month in the year 1929 from January 1 to July 16?

(Objection to this question overruled and the court held that Mr. Gates became the witness of the defendants for the purpose of this question, subject to the right of the plaintiff to cross-examine him.)

A. I did not.

Hugh A. White—Direct

Hugh A. White,

called for the plaintiff, testified/

I am a certified public accountant and a member of the firm of White, Bower & Prevo. I have been an accountant since 1928 and received my preliminary education and training at the University of Michigan. I worked for approximately six months for the firm of Peyton & Ross in Ann Arbor, Michigan, and for four and one-half years with Lybrand, Ross Bros., and Montgomery. Since 1933 I have been a member of my present firm. We have offices in Detroit and Chicago.

I have personally examined a large number of banks throughout the United States; including, among others, the First National Bank, in Detroit, the Peoples Wayne County Bank and American State Bank, in that city, the Liberty State Bank of Milwaukee, the First Wisconsin National Bank of Milwaukee, the Ottawa State Bank of Ottawa, and certain records of the National Bank of Kentucky.

I started to work on records of the National Bank of Kentucky in 1931 and have done considerable work on those records since that date.

Exhibit 68, prepared by me, is entitled "Report of Operations of BancoKentucky Company for the period of October 1, 1929, to November 22, 1930." This exhibit was prepared from the general ledger and cash journal of the BancoKentucky Company. This exhibit is an analysis of the operations of the company for the period mentioned, as shown by the books of account of the company. It is broken down into quarters. The first period is October 1, 1929, to December 31, 1929, and for each quarter thereafter, and for the short period from October 2, 1930, to November 22, 1930. The last column is the total for the entire period.

Hugh A. White—Direct

The first section shows the income of the Banco Kentucky Company, as shown by its books of account. That is classified as to the various classes of income. There are only two classes of income: interest and dividends on bank stock. The interest was paid by the National Bank of Kentucky and the Louisville Trust Company on certificates of deposit. There is also an item of interest of \$2707.40 paid on stock subscriptions, which were not paid by October 1, 1929.

The item of expenses is broken down into various classes such as interest paid, examiner's fees, etc. The interest paid was on money borrowed by Banco from the Chemical Bank & Trust Company, and for a short period from the National Bank of Kentucky. The money borrowed was deposited in the National Bank of Kentucky and Banco received interest back on this deposit.

I found no item recorded on the books of the company which reflected any payment of salaries to employees or officers. There was no item of office expense in the way of rent, no expenditure for heat, light or telephone.

The total income from the period from October 1, 1929, to November 22, 1930, was \$1,307,662.29. The total expense was \$97,413.24. The net income was \$1,210,249.05.

Total dividends paid to stockholders during the entire period of its existence was \$1,253,513.00, which was \$43,263.95 in excess of net income received. The money to pay the deficit came from the National Bank of Kentucky. It was met by an overdraft in the sum of \$81,537.15 in that bank. Every quarter, after the first quarter, Banco Kentucky Company paid out in dividends to its stockholders more than its net income as shown by its books of account. For the quarter ending April 1, 1930, the excess was \$23,824.34; for the quarter ending July 1, 1930, the excess was \$30,410.64; for the quarter ending October 1, 1930, the excess was \$13,212.45; in the short period from October 1, 1930, to November 22, 1930, there were no dividends paid

Hugh A. White—Direct

but the expenses exceeded the income for that period by the amount of \$1332.47.

The report also shows the excess of amount received for BancoKentucky Company stock over amount paid on retirement of the same. This is shown by quarters and the total equals \$275,862.50. That figure represents the difference between the amount paid by the BancoKentucky Company for 106,000 shares of its own stock which was retired, less the amount which BancoKentucky Company had received on the sale of that stock. This figure was placed on this statement in order that the statement will tie-out with the undivided profit account as shown by the books of the BancoKentucky Company. The figure is taken from the books and is there set up as an operating profit. It grew out of the fact that the company bought back its own stock for less than the price for which it sold the stock. In my opinion this is not an operating profit in any sense of the word. It is a capital and surplus adjustment item. However, I place it on the statement to tie-back with the books. The item simply means that by purchase of their own stock they have adjusted their own capital liability.

The exhibit also shows the details of the dividends and from which bank the dividends came. Also, the various details of the expense classifications as shown on the statement.

The percentage of the income received by Banco from dividends as compared to the interest item and the sum received from the Union Central Life Insurance Company dividend was in excess of 90%.

Exhibit 116 is a statement showing comparison of quarterly net earnings, loans charged off, less recoveries and net additions to reserve for taxes with dividends paid as shown by books of the National Bank of Kentucky from April 1, 1927, to September 30, 1930. The tabulation is by quarters.

Hugh A. White—Direct

The black figures in the last column show the excess of the net earnings of the National Bank of Kentucky for the quarter indicated over dividends paid during that quarter. The red figures show the excess of dividends paid during that particular quarter over the net earnings for that period. The final figure in the amount of \$500,905.27 is the net total of the items shown for each quarter. It shows that during the period April 1, 1927, to September 30, 1930, the National Bank of Kentucky paid out \$500,509.27 in dividends more than their net earnings during that said period. This is shown by the books of the National Bank of Kentucky. The figures only take into consideration such chargeoffs as were actually made on the books of account not those that were requested by the National Bank Examiners in their bank examinations but not made.

Exhibit 120 is a calculation of the proportionate ownership of National Bank of Kentucky stock represented by ownership of each share of BancoKentucky Company and the proportionate part of assessment on National Bank of Kentucky stock allocated to the ownership of each share of BancoKentucky Company stock. It is an arithmetical accounting to determine the percentage of national bank stock represented by a share of holding company stock and allocating the assessment on the bank stock held by the holding company to the shares of the holding company stock. The amount of the calculation is \$2.305386. This is somewhat less than the amount for which an accounting was prayed for in the petition. The figure there used is \$2.304909. The difference is in favor of the stockholder.

Exhibit 77 is a summary of the interlocking directors of the National Bank of Kentucky, the Louisville Trust Company and BancoKentucky Company for the years 1927 to 1930, inclusive. It was made up from the minutes of the stockholders and directors of the three institutions. Each

Hugh A. White—Direct

of the directors is listed in the first column. The second column headed "Elected to Board of Directors" and sub-headed "National Bank of Kentucky and Louisville Trust Company," shows the date of election of the individual for the year 1927. The word "yes" shows that the director was elected under the date listed.

The next two columns are for the year 1928 and this is followed by three columns for the year 1929 and three columns for the year 1930 showing the date the directors were elected. The exhibit does not show the interlocking directorate between directors of BancoKentucky Company and any of the banks whose stock was held by BancoKentucky Company other than the Louisville Trust Company and the National Bank of Kentucky.

Exhibit 146 is a report on loans made by the Louisville Trust Company for payment of subscriptions to capital stock of BancoKentucky Company during the period September 25, 1929, to November 7, 1929. The exhibit was prepared from the books of the Louisville Trust Company and the BancoKentucky Company. It shows the amount borrowed from the Louisville Trust Company to pay original subscriptions to capital stock of the BancoKentucky Company. The first column lists the name of the subscriber to Banco stock; the next column is the date on which the subscription was paid; the third column is the amount of the subscription and the last column is the amount borrowed to pay the subscription. The amount borrowed was taken from the books of the Louisville Trust Company. The remaining information came from books of BancoKentucky Company.

The exhibit shows that \$1,637,154.62 was borrowed from the Louisville Trust Company to pay for original subscriptions to stock of the BancoKentucky Company.

Hugh A. White—Direct

Exhibit 147 is a report on bills payable and rediscounts of Louisville National Bank & Trust Company and Louisville Trust Company for the period from January 1, 1929, to November 16, 1930. It was prepared from the books and records of the Louisville National Bank & Trust Company and the Louisville Trust Company. It shows for each month in the year 1929 and 1930 until November 16, 1930, the number of days each month the banks were indebted for money borrowed. It also shows the average daily borrowings of the bank for that time.

In January, 1929, the Louisville Trust Company was indebted for money borrowed for 31 days. The average daily borrowing was \$709,677.00. At the same time, the Louisville National Bank & Trust Company was indebted for the full month with an average daily borrowing of \$678,232.00. The report shows the same information for each month during the period. The exhibit shows that in May, 1929, the Louisville National Bank & Trust Company was indebted for only 25 days. The reason for that was that the Louisville National Bank & Trust Company was consolidated with the Louisville Trust Company on May 25, 1929, and from that time only it had no separate existence.

Exhibit 148 (not reproduced—original exhibits) is a summary of information relating to holdings of stock of Banco Kentucky Company by all stockholders on November 17, 1930. This exhibit was prepared under my supervision. The first column naming the shareholders was prepared from the list of shareholders of the Banco Kentucky Company as of November 17, 1930. It was taken from the records of the transfer agent, Louisville Trust Company.

The second column—amount of assessment—is a mathematical computation of the total number of shares multiplied by the rate as shown in the bill \$2.304909. The information in the third column under the heading "Total shares" was received from the transfer agent.

Hugh A. White—Direct

The next four columns under the heading "Classification of Stockholders" refers to the persons listed in column 1. The first column under that general heading—Exchanged TPC for Banco—shows the holdings of the stockholders on November 17, 1930, who exchanged Trustees' Participation Certificates for BancoKentucky Company stock in 1929. The next column—Exchanged other Bank stock for Banco—lists the shares of stock of BancoKentucky Company held by stockholders on November 17, 1930, who exchanged bank stock other than Trustees' Participation Certificates for BancoKentucky stock. As for example, a Pearl Market or Brighton Bank stockholder who exchanged his stock for stock of the BancoKentucky Company and who was not a holder of a TPC.

The next column under the caption "Original Subscriber for Banco" shows the number of shares of BancoKentucky Company stock held by stockholders on November 17, 1930, where those stockholders were original stockholders for BancoKentucky Company but were not shown as having exchanged Trustees' Participation Certificates or other bank stock for BancoKentucky Company.

The fourth column entitled, "Otherwise Acquired Banco" shows the number of shares of BancoKentucky Company stock held on November 17, 1930, by all other stockholders of the company who are not listed in the first three columns.

On November 17, 1930, there were 2,072,468 shares of capital stock of the BancoKentucky Company outstanding, exclusive of the 400,000 shares that were held in escrow by the Louisville Trust Company. The total number of shares held on that date by stockholders who exchanged Trustees' Participation Certificates for BancoKentucky Company stock amounted to \$1,063,517.00, or 66.68% of the total outstanding stock on November 17, 1930. The percentage held by stockholders who exchanged Trustees' Participation

Hugh A. White—Direct

Certificates for BancoKentucky Company stock with the shares issued to Caldwell & Co. added in, but not including the 40,000 shares issued to Caldwell & Co. held in escrow, shares on which no dividend was paid, amounted to 51.32%.

The total number of shares of stock of BancoKentucky Company held on November 17, 1930, by stockholders who exchanged their bank stock other than Trustees' Participation Certificates for BancoKentucky Company stock amounted to 159,833 shares and excluding the Caldwell stock this group held 10.02% of the entire outstanding stock. If the Caldwell stock is included then this group held 7.71%.

Persons falling into the third classification, that is, original subscribers who did not exchange either TPC's or other bank stock for BancoKentucky stock held on November 17, 1930, 191,556 shares, and excluding the stock on which no dividends were paid they held 12.01% of all the outstanding shares. If the stock which was outstanding in the hands of Caldwell & Company but on which no dividends were paid was included then this group held 9.24%. Subscriptions for this stock by persons in this group were made on the perforated portion of Exhibit 24-4, that is, the bottom part of the subscription blank.

The exhibit includes a classification of the shares of stock of the BancoKentucky Company held on November 17, 1930, by Caldwell & Company and its nominees. There were 480,086 such shares and this included 100,000 shares held by the bank. Excluding the Caldwell stock on which no dividends were paid, but including the 100,000 shares, the percentage of the total under group four to the total number of shares of stock outstanding was less than 1%—only .73%.

If the Caldwell stock itself was included in the total, it would amount to 23.60%.

Hugh A. White—Direct

Group 5—Shares of stock of BancoKentucky Company held on November 17, 1930, by Stockholders whose stock was otherwise acquired—includes 168,476 shares in the classification. In that classification I would include an individual who bought BancoKentucky Company stock in a brokerage house without ever having prior thereto had any connection whatsoever with the company or its subsidiaries. All shareholders appear in the last classification where their stock was acquired other than by exchange or through original subscriptions. The percentage of the total to the whole, including the Caldwell stock in this group, is 8.13% and if the Caldwell stock is excluded it is 10.56%.

Cross-examination by Judge Deitzman

The exhibit lists Richard P. Deitzman total number of shares 150. There is also a listing in the third column, exchanged TPC's for Banco 150. I do not know whether the record shows a subscription blank on your part for 10 shares and 140 exchanged. I have made no attempt to divide between those who exchanged. Where one individual exchanged TPC's and also subscribed for Banco I put him in the column of those who exchanged TPC's for Banco. The third column does not mean that the person listed exchanged Trustees' Participation Certificates for all the Banco stock included. It shows that the individual listed had a certain number of shares on that day and that he exchanged TPC's for Banco. There is no way from reading the exhibit to show that you subscribed for 10 shares of Banco and not for 150.

The Court: "He doesn't say that all that stock was exchanged for Participation Certificates; he says that in the case here of Judge Deitzman that he owned 150 shares and that he was an original owner of participation certificates, which he exchanged. It is just to identify him as having

Hugh A. White—Direct

originally been a holder of participation certificates—it says he wound up with 150 shares of Banco stock and that he acquired some of that stock by exchange for participation certificates.”

Judge Deitzman: “I wonder if they will agree to add ‘exchanged TPC’s for Banco stock in whole or in part.’”

The Court: “You have no objection to that addition suggested by Judge Deitzman—it is nothing more than exactly what the column is. I think in the light of the cross-examination it is a proper addition to the exhibit.”

Judge Marx: “We agree to the addition.”

Cross-examination by Mr. Van Winkle

If a man had one share of stock in an Ashland or a Paducah bank, which he exchanged for Banco and on another occasion acquired 1000 shares of Banco by purchase, he would be listed in the second column even though he only got 20 shares by exchange and purchased 1000 shares. Only the amount he held on November 17, 1930, is shown in that column. The list is not confined to the amount of stock that the individual acquired in Banco by exchange. It includes all stock that the individual who happened to get some stock in Banco by exchange may have acquired at a subsequent date and which stands in his name on November 17, 1930, regardless of how to get it. It means that in whole or in part he got some of his stock by exchange.

Mr. Van Winkle: “The column ought to have ‘acquired in whole or in part by exchange of other bank stock.’”

The Court: “I am going to add to this exhibit ‘Exchanged TPC’s for Banco in whole or in part,’ and ‘exchanged other bank stock for Banco in whole or in part.’”

That will indicate that possibly only a fraction of the number of shares was received in exchange for TPC’s or

Hugh A. White—Cross

for other bank stock—the question involved here is knowledge. It doesn't make any difference whether he got four or just one share if he exchanged any TPC's for Banco. He couldn't have knowledge for some of his stock and no knowledge on the other—if a man owned any stock whatsoever which he acquired by exchanging TPC's, no matter how much more stock he got, the question of knowledge is what this court is concerned with and you can't separate it and say he had knowledge as to that and no knowledge as to what he acquired in the open market."

Hugh A. White,

recalled for cross-examination by Mr. Crawford, testified:

I first came to Louisville to work on affairs of the National Bank of Kentucky in 1931. I then examined certain records of the bank and various other concerns in connection with the directors' suit. Somewhere between twenty and thirty men connected with the firm of Lybrand, Ross Bros. & Montgomery with whom I was then associated were engaged in the work. I worked on this matter from May of 1931 until the following March. Then I was away for awhile and was back in Louisville until July of 1932. Some of the other senior accountants who were here were Mr. H. Glenn Huffman, Harold Hoffman and Carl Lutz. Lybrand was engaged in that matter from May of 1931 until June, 1932.

The bank was a large bank in comparison with many banks but it was much smaller than the First National Bank in Detroit or some other banks I have worked on. It had resources at various times up to sixty million dollars and down to probably thirty-five million dollars. It had a regular amount of files for a bank of that size, including credit files for the borrowers of the bank and correspond-

Hugh A. White—Cross

ence files. I worked on the Wakefield matter, Caldwell matter, Herald-Post and some other items.

It was stipulated that there were two hundred employees of the bank. The bank had a great many transactions every day.

Q. How big were the letter files?

The Court: It will be assumed by the court that they were very large.

The figures shown on Exhibit 68 were taken from the books of the Banco Kentucky Company. The exhibit is an analysis of the operation and reconciliation to the undivided profits account as shown by the books. There are other receipts and disbursements which do not affect operations. For instance, the sale of capital stock and purchases of banks. None of that is recorded in the exhibits. On December 23, 1929, which was a dividend date, there were 1,719,842 shares outstanding. No dividend was paid on 187,173 shares of this stock. Dividend was paid on 1,532,669 shares. The dividend was \$306,533.80. If the Banco Kentucky Company had simply held a Trustees' Participation Certificate entitling it to dividends from the National Bank of Kentucky and the Louisville Trust Company it would not receive from them enough money to pay the total dividend which Banco paid. Banco had to earn money from other sources other than the participation receipts which it held in order to pay the dividend. The amount of dividends which Banco received on Trustees' Participation Certificates was \$210,297.60.

Both the Bank of Kentucky and the Louisville Trust Company paid a dividend to the Trustees on the same day that Banco paid a dividend to its shareholders. Banco could not have paid the dividend which was paid on its outstanding stock which was issued for cash and in exchange for stock of other banks out of the dividends which

Hugh A. White—Cross

Banco received from the Trustees' Participation Certificates. They had to get other income to take care of that dividend. They had to first pay expenses which during that period were \$37,054.48.

Banco received \$79,000.00 interest from the Louisville Trust Company and the National Bank of Kentucky on certificates of deposit and \$210,297.60 dividend from those institutions on stock which Banco owned in those two banks. That was the only payment that Banco received from the Louisville Trust Company and the National Bank of Kentucky by reason of the ownership of the Trustees' Participation Certificates. However, the interest paid to BancoKentucky Company on certificates of deposit was at a much higher rate than regular certificates of deposit. This higher rate was paid by reason of Banco's ownership of these participation certificates.

After deducting from the \$210,000.00 expenses of BancoKentucky Company, approximately \$173,000.00 remained. If only the original trustees' certificate holders were concerned it would have taken the whole \$210,297.60 to pay the same dividend rate. Banco had other sources of dividends in addition to the National Bank of Kentucky out of which it could pay the entire dividend. It received dividends on other bank stock and the interest items. Banco could not pay its dividend out of the dividend it received from other banks plus the dividend from the Louisville Trust Company and the National Bank of Kentucky. They had to supplement that with earnings from money they had which was deposited in the Louisville Trust Company and the National Bank of Kentucky.

The total income of the BancoKentucky Company for the first period, less the expenses paid exceeded the amount of the dividend for that quarter. After deducting from the income received during that period the expense and divi-

Hugh A. White—Cross

dend paid the balance was \$25,515.95. In order to have that amount left over at the end after paying expenses and the dividend on the Banco stock, taking into consideration only expenses actually paid, the amount of their income, that is, income other than dividends on bank stocks received during that period, was \$82,345.62, which is the total of the first two lines in Col. 1, Ex. 68, made up of interest on certificates of deposit and interest on stock subscriptions.

The total dividends paid by Banco to all its stockholders during any one period exceeded the amount of dividends received by Banco on Trustees' Participation Certificates. There was no period when the income from bank stock held by Banco equalled the dividend payment. If there were any expenses incurred by Banco in addition to those set out in Exhibit 68, that is expenses not paid, then the deficit at the end of each quarter would be increased.

Approximately 390,000 shares were sold by Banco Kentucky Company coincident with the transfer of the Trustees' Participation Certificates. In order for a person transferring his Trustees' Certificates to Banco having any assurance that he would get the same dividend that he had theretofore received he would have to assume that the other bank stocks which the holding company were buying would pay the same rate.

Banco paid for some of the Cincinnati stock in September, 1929, and was under contract to buy. No expenses are shown on the books of Banco other than those set out in the exhibit. The claim of the Receiver of the National Bank of Kentucky for services is not included. The records only go to the date of the receivership of Banco and claims made with the receiver are not set out in the exhibit.

Banco Kentucky Company shows a balance in the undivided profit account at the close. I made a distinction between operations and other monies they had or received

Hugh A. White—Cross

in the undivided profits account. I did not include the sale of stock and repurchase of stock in operations. Trading in stock is not an operating profit of the company. If a company sells investment stock cheaper than it buys it that is an operating profit but retirement of their own capital stock is not such an operating profit. According to their books the stock was cancelled as an outstanding liability. The surplus account was reduced. The capital stock account was reduced and the undivided profits account was increased. That made a profit of \$275,862.50 which is called an appreciation on purchase of stock. It is not an operating profit. The red figure of \$43,263.95, which appears in the last column of the exhibit, does not appear on the books of the company. I put this excess of amount received for BancoKentucky stock over amount paid on retirement in here to bring the operations of the BancoKentucky Company into agreement with the books of account. This is not a copy of the books, it is an analysis. It is not changed from what the books show.

The Court: That just purports to be a summary account of what the books indicate to an auditor.

Exhibit 116 shows the extent or deficiency of net earnings as over the dividends paid as of particular dates. It shows the net additions to reserve for taxes compared with the dividends paid as shown by the books of the National Bank of Kentucky from April 1, 1927, to September 30, 1930. It does not take into account any carry-over earnings not distributed as of the beginning of the quarter. The undivided profits of the bank as of the beginning date of this statement were \$1,459,511.58.

Exhibit DP-17 (filed in the case of Keyes v. Akers) made by Mr. Carl W. Lutz, who was a senior accountant and a qualified one and was working for the same firm I was, Lybrand, Ross Brothers & Montgomery, at the time we

Hugh A. White—Cross

were making preparations for the trial of the case of Keyes v. Akers, is a schedule which agrees with my statement.

“Q. 262. I show you exhibit No. DP-17 made by Mr. Carl W. Lutz of your organization and brought by the Receiver in evidence—the plaintiff in that case: I will ask you if that was not filed in there and if that isn’t a statement made up purporting to show the same thing you refer to in this case?”

A. Well, inasfar as this schedule goes it agrees with my statement. That only has three columns, while I have additional information on mine. That first column agrees. The next column is the dividend paid, which agrees with the column ‘Dividend Paid’ in mine.

Q. 263. Isn’t the final answer in yours the same as this here ‘Excess or Deficiency of Net Earnings Over Dividends?’

A. That is the heading of my last column.”

I have additional information on mine. The first and second columns are the same. The heading of the final column, “Excess or Deficiency of Net Earnings Over Dividends” is also the same. I did not compare my statement with the published statements of the bank. The earning statements of the bank were never published and I have never seen them. There was always a balance to the undivided profits account, according to the books of the bank. The reduction in the undivided profits account of the National Bank of Kentucky, covered by the period from April 1, 1927, to September 30, 1930, was \$1,312,754.00. The change in the capital structure came at the time of the unification, which was after April 1, 1927. \$1,000,000.00 was taken from the undivided profits account and put into capital between April 1, 1927, and June 30, 1927. The net change, as far as operation goes, in the undivided profits account is \$312,000.00. The schedule shows it at \$500,905.27,

Hugh A. White—Cross

and the heading shows exactly how it is made up. Exhibit 116 agrees with the books.

Exhibit 77 is a summary of the interlocking directors of the National Bank of Kentucky, Louisville Trust Company and Banco Kentucky Company. Forty-nine directors were elected to Banco Kentucky Company. Sixteen had been directors of Louisville National Bank and Trust Company. All the remainder, thirty-three, were directors of National Bank of Kentucky before Banco was formed. Of the thirty-three, fourteen retired from the Board of the National Bank of Kentucky, but still remained on the Board of Banco. The sixteen directors of Banco who came from the Louisville National Bank and Trust Company were never directors of the Bank of Kentucky. The Louisville Trust Company directors retired from the Bank of Kentucky Board in January, 1930.

The average daily borrowings by National Bank of Kentucky for the month of November, 1929, was as high as \$15,026,711.00 as shown by Exhibit 117. The bank was in debt at all times to the close in 1930. The lowest monthly average of debt was in March of 1930, \$322,581.00.

394,786 shares of Banco stock was subscribed for prior to October 1, 1929, and ultimately paid for in cash. These shares were issued for \$9,869,650.00, as shown in Exhibit 126. The records of the company indicated that this stock was issued. Many of the people who bought these shares owned Trustees' Participation Certificates prior to that time. The amount of liability these trustees' certificates carried per share prior to the formation of Banco, in the event the National Bank of Kentucky failed, was approximately \$6.97 for a \$10.00 share. One Trustees' Participation Certificate was exchanged for two shares of Banco of the same par value, which meant that substantially each Banco share carried one-half of the liability of the trus-

Hugh A. White—Cross

tees' participating shares. This is so on the assumption that only an exchange for Trustees' Participation Certificates for Banco was involved. Every time additional shares of Banco were added, the amount of liability per share would decrease since the per share assessment would be spread over more shares.

As an illustration, if a person had fifty shares of Trustees' Participation Certificates and transferred them into Banco without any other holders at all, his assessment liability would be \$350.00 on his Trustees' Participation Certificates, figured on the basis of approximately \$7.00 a share. He would get 100 shares of Banco and they would carry an assessment liability at approximately half of \$6.97 per share, or \$348.50.

Hugh A. White,

recalled for plaintiff, testified:

My statement with reference to the assessment liability carried by a Trustees' Participation Certificate—\$6.94 on a Trustees' Participation Certificate—did not refer to the entire assessment liability of such certificate, but only to that portion which represented ownership of National Bank of Kentucky stock. On the \$10.00 par Trustees' Participation Certificate the total liability was \$10.00, and on the \$100.00 par certificate, it was \$100.00.

In my opinion, there is no inconsistency between Exhibit 116 and the exhibit prepared by Mr. Lutz. In Mr. Lutz's statement the first column was for quarterly earnings the same as Exhibit 116. The second column was the quarterly net earnings, and agreed exactly with Exhibit 116. Those are the operating figures from the operating ledger closed out to undivided profits quarterly. Mr. Lutz's next column shows "Dividends Paid," which agrees to the next to last column of my schedule.

Hugh A. White—Cross

I have included in my schedule various things Mr. Lutz did not include. I have shown in the third column "Loans Charged Off, Less Recoveries." Those are items going directly to the undivided profits account, but they do not go through the account from the operating ledger. They are closed into the undivided profits quarterly.

The fourth column is headed "Addition to Reserve for Taxes, Less Taxes Paid." The National Bank of Kentucky had a system of charging to expense monthly a flat amount or arbitrary amount for taxes, and crediting that amount to a tax reserve. Then as the taxes were paid, they were charged to that reserve. It worked out that the amount set up in the reserve account was excessive, so, in order to show the correct picture of the operations of the bank, I have taken the net addition to the reserve, that is, the amount that is charged to expense and credited to reserve in excess of the amount which was actually paid for taxes each quarter, and set it up in the fourth column and added it to the net quarterly earnings. Then I deducted the amount of loans charged off—that is the third column—and that gives us the fifth column, or "Net Profit or Loss" column, which is just a mathematical calculation or deduction.

Cross-examination by Mr. Johnson

In Exhibit 148 the column labelled "Original Subscribers," which amounts to 191,556 shares, represents the stock held by various stockholders who were original subscribers to BancoKentucky Company stock where those same individuals did not change their bank stock or T.P.C.'s for Banco. It is the amount they still held on November 17. The second figure 168,476 represents shares of stock of BancoKentucky Company held on November 17, 1930, by stockholders whose stock was otherwise acquired. Among those stockholders are those who bought some on the open market, through brokers or otherwise.

Robert Neill—Direct

Exhibit 126 shows that 394,786 shares of the stock was originally subscribed and paid for. The assessment would be approximately \$2.97 if we would eliminate the 360,032 shares, which is the total of the last two columns as shown in Exhibit 148, that is on the assumption that the assessment is to be distributed over the remaining shares. The figure 394,786 shares on Exhibit 126 is the total number of shares of the BancoKentucky Company issued to the original subscribers for cash. The total of the last two columns in Exhibit 148 is the shares held on November 17, 1930, by stockholders who were not original T.P.C. holders or other bank stockholders whose stock was exchanged for the stock of BancoKentucky Company. Exhibit 126 shows that \$9,869,650.00 was received by Banco for the 394,786 shares subscribed for. Exhibit 65-B shows the name of the stockholders and the amounts paid by each of those stockholders.

Cross-examination by Mr. Deitzman

Mr. Deitzman: "Mr. White, giving due credit to the amount recovered from the BancoKentucky Company on this assessment sought to be enforced, what is the amount of assessment per share on Banco, exclusive of interest in the bill? Interest is included. I think you told me it was between \$1.76 and \$1.77?"

A. I think I told you between \$1.77 and \$1.78."

Robert Neill,

called by the plaintiff, testified:

I am Chief National Bank Examiner of the Eighth Federal Reserve District, under the Comptroller of the Currency of the United States. I served as examiner from January, 1913, for three years and resigned and came back into the service in 1928. As Chief National Bank Examiner

Robert Neill—Direct

for this District I personally make some examinations and supervise the making of another by a Board of Examiners and assistants. All told, I have been connected with the banking business one way or another for 36 years.

I made the last examination of the National Bank of Kentucky before its suspension. This was started as of September 17, 1930. In an examination the cash is counted, the notes are listed, and individual, general ledgers, and saving ledgers are proved, the accounts are reconciled with other banks and loans and investments are appraised to determine the state of solvency of the institution.

I have examined as many as four or five hundred banks and have reviewed four to five thousand national bank examinations. As a result, I have had considerable experience in the appraisal of loans. In the course of the examination of the National Bank of Kentucky I discussed the situation, condition and character of the loans and securities with the officers and other persons in the bank who were familiar with the situation.

I was transferred from New York City to St. Louis as Chief National Examiner of this district as of June 1, 1930. In reviewing the state of work and in order to familiarize myself with my new job, I conferred to quite an extent with my predecessor, Mr. John S. Wood, who was surrendering the position of Chief Examiner to become Chairman of the Board of the Federal Reserve Bank of St. Louis. I also reviewed the previous bank examinations of the National Bank of Kentucky made by my predecessor.

"Q. What did you ascertain from them as to the situation with reference to the National Bank of Kentucky?"
Defendant's objection was sustained to this question and his answer was made as an avowal.

"A. From investigation and research I made, I reached a very definite conclusion that the National Bank of Ken-

Robert Neill—Direct

tucky was in a critical condition before I started the examination."

The practice in an examination is for an examiner to mail his completed report to the Chief Examiner's office where the reports are typed, an original and four carbons being prepared. The original goes to the office of the Comptroller, the first carbon to the Federal Reserve Bank of the District, the second to the Board of Directors of the Bank, the fourth to the Field Examiner and the fifth being written as an office copy. National bank examinations are ordinarily made twice a year at irregular dates. The copy of the examiner's report that is mailed to the bank is addressed to the Board of Directors. There is clipped to each report a form letter of transmittal which is a perforated page. The upper half is the transmittal letter and the lower portion is an acknowledgment to be filled out and signed by an officer of the bank and returned to the Chief Examiner's office. This communication recites that the report has been considered in a regular or special meeting of the Board of Directors and signed by an authorized officer.

The reports sent to the National Bank of Kentucky were acknowledged in this fashion and these acknowledgments were filed in the Chief Examiner's office.

Exhibit 20 is a copy of the report of examination made as of September 17, 1930, from the books and records of the bank. During the making of that report I had occasion to discuss the matters mentioned with one or the other of the officers and I had such a conference with Mr. James B. Brown, President of the Bank.

My first introduction to Mr. Brown, first conference with him, was on the evening of October 7, 1930. It was held at the office of the National Bank of Kentucky and commenced about 8:30 and lasted until three o'clock the next morning.

Robert Neill—Direct

I had previously arranged to participate in the meeting of the Board of Directors to be held the next day, and I wanted to discuss the condition of the bank, as it appeared to me, with Mr. Brown before going into the directors' meeting. I did so in great detail that evening, which resulted in the long conference.

We discussed every criticism pointed out in the report without exception. The next day, October 9, a meeting was held with the Board of Directors in the Directors' room on the second or third floor of the Louisville Trust Company building. Thirteen directors were present including President Brown. At that time the examination was not completed and was still in progress. I prepared an agenda of the matters I desired to discuss with the Board of Directors.

"Q. Will you state from memory what subject you discussed before the Board of Directors and summarize what occurred in that meeting?

"Mr. Crawford: I object on behalf of all defendants other than the Directors present that day."

The court sustained this objection but admitted the answer as to all directors who were stockholders.

The regular order of business was disposed of first and then Mr. Brown turned the meeting over to me and announced who I was. I started in to explain to them about the current examination of the bank which was then in progress, stating that I was a newcomer in this particular section of the country, but that I had known of the National Bank of Kentucky ever since I had been in the banking business and knew its big reputation, and that coming to this district as Chief Examiner I had found that this was the biggest National Bank in the district outside of the city of St. Louis, and that it had 400 or 500 country bank deposits, about \$10,000,000 of country bank deposits representing the reserve of the country banks, and in my opinion,

Robert Neill—Direct

a bank of that type and character should have an unusually liquid condition of its assets and that I was correspondingly distressed on this, my first examination, to find that its assets were, in my judgment, in a lamentable condition.

The second item I took up was that the condition found was an indictment of the management of the bank. The third was that the trend was absolutely disconcerting to me, and I took up the question first of law violation. The first item under that head was Wakefield & Company—direct loans and accommodation loans for Wakefield, and I told them that in the first place the collateral was short, and next that the collateral—namely, that the collateral was not sufficient. As the loan was excessive in amount, it was illegal; and we had discovered in the course of our examination that they were carrying a \$100,000 note of Wakefield & Company which was put in the bank for the purpose of establishing a balance to make it appear that the line of credit to Wakefield & Company was based on compensating balances. To offset this \$100,000 note a \$100,000 Certificate of Deposit had been issued by the bank, payable to Wakefield, and it developed during the examination that during the past examination interest had been collected on this \$100,000 note paid by Wakefield & Company's check and then, shortly after the Examiners had left the Bank, this interest was rebated to Wakefield & Company and charged to undivided profits.

In my opinion it was perfectly apparent that these entries were made with intent to deceive first, the Board of Directors that the loan or credit to Wakefield & Company was based on compensating balances, and second, to deceive the Examiners that interest was paid on this loan, and that in my opinion the officers of the bank had probably rendered themselves criminally liable under the section of the statutes about making reports with intent to deceive.

Robert Neill—Direct

In that connection, I took up the Van Camp deal from its inception, as I understood it. I told them I considered the purchase of that last amount of stock was illegal and ultra vires that the bank had originally had some Van Camp stock which had presumably been legally acquired, and that subsequently the corporation gave rights to the old stockholders permitting them to buy a certain amount of new stock at a fixed price but it was decidedly moot question as to whether a National Bank had a right to exercise such option to purchase this additional stock against stock that they had already acquired in the course of business legally. That I leaned to the opinion that it would be illegal for them to exercise those rights in the first place but this purchase represented a much larger amount of new Van Camp stock than possibly those rights entitled them to buy.

Then the question was taken up about them paying \$22.00 a share for that stock when it was reported to me that some of the Directors in the Bank had bought it at \$18.00 about the same time and later on this same stock which was bought at \$22.00 a share was sold back to Wakefield & Company at \$4.00, resulting in a loss of \$242,500. Instead of charging that off as a loss, that the loss had been capitalized by adding that to the carrying value of 100,000 shares of Banco Kentucky stock, which the bank had acquired in the deal with Caldwell & Company— ostensibly through such a deal.

Then I took up the Norman Company excess loans. In the first place, it was perfectly apparent it was a bad loan and that the bank practically owned the business. As I recall the figures they had nearly \$800,000 in the business which was two or three times more than the stockholders had according to the statement from the bank's credit files and I proposed to discuss that further when we got down to the question of individual losses.

Robert Neill—Direct

Then I took up the line of credit of Caldwell & Company that in my opinion it was an excessive loan made in violation of law, and that the recent loan had been made on the basis of a higher value per share of the Inter-Southern Life Insurance stock than the then market price and I would discuss that further when we got to the next point of "Concentration." Then we took up the question of overdrafts outstanding and one of these was the Kentucky Wagon Manufacturing Company overdraft and E. B. Norman & Company overdraft and the Herald-Post Company overdraft.

The Kentucky Wagon Manufacturing Company had ostensibly been sold and no longer belonged to the bank, yet the bank was continuing to pour money into it by allowing overdrafts of that company amounting to that time to \$55,000 or \$60,000; that from the trend of the business of E. B. Norman & Company it looked like it was pouring water down a rat hole, to put any more money into that, and yet they were continuing to finance them through the medium of overdrafts.

Then I called attention to the Herald-Post overdraft, at the Fourth Street Branch and that it was a large one, and I understood from some of the Directors that it was not always properly reported. The Herald-Post Company has two accounts with the Fourth Street Branch, one of which showed a credit and the other an overdraft, and in reporting to the Board, the management reported the net overdraft and didn't give the Directors the true picture that I thought they ought to know about this situation.

Then we took up the question of the concentration of credits. I recited to them that our research into the affairs of the bank had gone to the point to show that the bank had \$2,251,000 at risk on the basis of collateral of the American Turf Association stock, 121,263 shares.

Robert Neill—Direct

The loan on the American Turf Association stock represented approximately twenty-five per cent of the total outstanding stock of that corporation. It was an unlisted stock with a restricted market and in my opinion it was mighty poor banking to land one-half of the bank's capital on an unlisted stock.

Then we took up the question of the loans on Banco Kentucky. There were loans of about \$3,478,000 against 212,564 shares of Banco and that was 8.62 per cent of the outstanding stock. In addition to that the bank had in its Investment Account 100,000 shares which represented about 4.06 per cent, that with the collateral and what they owned they had about 12.68 per cent of the stock in the corporation which owned the bank practically 100 per cent and in my opinion loans on this stock were illegal in that they were made to an extent an undetermined amount at that time made against the stock of the bank itself, and that the same criticism applied to the 100,000 shares they had in the Investment Account.

Then on the question of Caldwell loans on Inter-Southern Life Insurance Company stock, the figure I had on the memorandum was \$2,708,000 and at that time they had 567,000 shares of Inter-Southern Life Insurance Company stock as collateral, and I understood that represented about 20 per cent of the outstanding stock of the Inter-Southern Life Insurance Company.

Before that meeting, at some time, I don't remember just when, I personally suggested to Mr. Speed that I thought they ought to withhold approval of that last \$300,000 loan on Inter-Southern Life Insurance Company stock, that I considered it excessive, and under my construction of the law, Directors who voted approval of an excessive loan became personally liable for any loan that resulted on those loans; that I wanted to work with the

Robert Neill—Direct

Board with the idea of cleaning up the bank, and I wanted to show my good faith by not leading them into any traps.

I called attention to the fact that the loans represented in this tabulation amounted to \$8,519,000; that that amount closely approximated one-third of the total loans in the bank; that none of those loans were eligible for rediscount with the Federal Reserve Bank and in addition to that were subject to severe criticism on account of putting, as I considered it, too much at risk on the basis of these stocks. It was a wholly undesirable distribution of the credits to the bank.

Then I brought up the question of the lack of cohesion among the officers, as I expressed it on this memorandum. It was perfectly apparent from the contact that I had had with the officers of the bank during the course of this examination that there were questions of lack of cooperation, and I might even state jealousies existing in the personnel, which was a bad trend in a bank of this size with the type of deposits I found that it had.

Then I found that it had two re-purchase agreements out for about \$2,400,000, as I recall, and that this great concentration, I mentioned above, was emphasized by the fact that my information from the Auditor of the bank was that there was only 4,000,000 of eligible papers in its portfolios, and that contrary to the position of the bank in past years when they had had to borrow heavily from the Federal Reserve, they had no United States bonds, which were eligible as collateral with the Federal Reserve banks, that they had a minimum amount of secondary reserve in liquid bonds which could be used as collateral with correspondents, that the bank had in the past borrowed \$17,000,000 to \$18,000,000, and if the future again presented a need for such a borrowing capacity, they would be up against it.

Robert Neill—Direct

Then we took up in detail the question of Estimated Losses, and some of the other loans that were considered slow and doubtful. I am quite sure we didn't attempt to go into all of them. Examiner Mooney sat along side me with his complete loan slips. When we would go into the question of any particular loan he had the information available there on his loan card and I would take that and read the information he had fixed up about this particular loan, and then they were taken up for discussion.

Mr. Brown would call on the officer who had charge of the department in which this particular loan originated and ask for a statement from him in regard to it, and there were practically no loans in this list on which there was any material difference of opinion; when we got through with the discussion, they were practically all admitted losses. I then produced a list aggregating \$1,554,812.95.

Included in the list was Murray Rubber Company, \$580,000, which was considered absolutely valueless and which was admitted by those present to be a loss. I also listed the Lewis Humphrey note, another item on the list, in the sum of \$24,700.00, as a total loss. There was some discussion on that item but in the last final analysis was admitted as a loss. After the discussion of the losses we came to the discussion of my conclusion or recommendations in the matter. The first one was to provide for the present loss estimate. The next was to stop the bad trend in the question of the assets and management. My recommendation was to change the form of management by amending the By-Laws to provide for an Executive Committee of six Directors who should control the investment policy of the bank, and that there should be a By-Law defining the powers and duties and responsibilities of the Officers to the Board.

Robert Neill—Direct

The question of determining the losses was postponed until the next day. The hour was growing late and I suggested at this first meeting the personnel for this Executive Committee. I suggested Messrs. William S. Speed, E. J. O'Brien, Henry Vogt and S. E. Duncan, who were Directors of the Bank and non-officers, President Brown, Vice-President Ormsby, who were officers of the bank, and Mr. J. S. Akers, who was the Vice-President to act as secretary of this Executive Committee. That was the suggestion that was fully discussed. The Executive Committee was duly appointed by the Board of Directors and those that I have named as the Executive Committee. Whether that was done this day or the next I was not clear then nor am I now.

We met about the same time in the afternoon the next day at an adjourned meeting of the Board. As above stated, I am not perfectly sure whether this Executive Committee was appointed on the first afternoon or not, but I do recall shortly after convening on the second day Mr. Brown took me to task for presuming to suggest the personnel of this Executive Committee in the face of my statement at the opening of my part of the other meeting, that I was a stranger in Louisville. He appeared to think it was presumptuous on my part to suggest the personnel and thought that I had shown favoritism of some description in having failed to include Mr. Angermeier on this Executive Committee, because he stated that he considered Mr. Angermeier the outstanding banker of Louisville and that he should have been on this Committee. I told him very frankly his criticism might be all right, but I had given the matter consideration and had had opportunity to discuss the personnel of the Committee with my associate and that the Comptroller's files were open to me and I thought I had a pretty good line on the Directors of the bank, and had

Robert Neill—Direct

made the selection after what I thought was due consideration and had exercised my best judgment in it.

Then we came in the secondary meeting to the question of disposing of these losses, and I do not recall whether it was the first day or the second day that Mr. Brown went into a considerable history of the purpose and objects in view in the formation of the BancoKentucky Company. He gave the number of the constituent banks. He went into detail as to each one's assets, condition and value and that the holding company was the parent concern, that the expectation was and had been that the holding company would be in a position to take care of the member banks, if any occasion of that sort should arise, but that due to the condition of the stock market at the time of the flotation of this stock it didn't have as much cash on hand as they had hoped to have. I asked him then, "Mr. Brown, you consider this just a miniature Federal Reserve System?" He said, "Yes, that is what it is and what it is supposed to be." I then said, "Here is an opportunity for the parent concern to come to the rescue of its biggest unit. The BancoKentucky Company owns practically 100 per cent of the stock of the National Bank of Kentucky and in my judgment the BancoKentucky Company should clean this bank to the satisfaction of the supervising authorities," and I suggested that the BancoKentucky Company as an alternative should buy or take out a million dollars of these criticized assets and that they had approximately enough of undivided profits to charge the balance off on the books of the National Bank of Kentucky. So, it was agreed that the BancoKentucky Company would use its best efforts to borrow \$1,000,000 to buy the criticized assets, and then came the question of charging off, and a resolution was presented, by whom I do not now recall, that this \$320,150 be charged off against the carrying value of 100,000 shares

Robert Neill—Direct

of Banco Kentucky stock and that resolution went to a vote and was tied and President Brown broke the tie and made it 7 to 6 against the charge-off. Mr. Brown refused to follow my recommendation.

The value of the Van Camp Packing Company loss was \$242,500.00. After this meeting I completed my examination of the bank and wrote a letter to be presented to the Board of Directors. A copy of this letter is included in the report of examination. My letter to the Board, dated October 11, appears on pages 11-8 and 11-9 of the report of examination (pages 983, 984, reproduced exhibits), and the Board's letter addressed to the Comptroller of the Currency, dated October 24, 1930, appears on extra pages 11-10 and 11-11 of the same report (pages 985, 986, reproduced exhibits).

After the delivery of this letter I returned to my office in St. Louis to complete the detail of the report of examination and have the required number of copies transcribed. I personally brought the Board of Directors' copy back to Louisville and presented it at a meeting of the Executive Committee on October 23.

The cash position of the bank was none too good at the start of the examination and at the close the bank's borrowings had increased to practically four million dollars. Page 1 of the report discloses that the total cash on hand with correspondents, as of the beginning of the examination, amounted to practically eleven and a half million dollars, against total deposits of \$39,000,000, and as a further offset to that cash there was approximately \$2,000,000 of liability in the form of securities sold under repurchase agreement and bills of exchange endorsed and guaranteed, the equivalent of borrowed money, which would serve practically to reduce the cash position to \$9,000,000 as related to approximately \$40,000,000 of deposits.

Robert Neill—Cross

There had been seasonal fluctuations in the deposits of the bank to the extent that the record disclosed that in the near past the banks had owed as much as \$17,000,000 or \$18,000,000 in bills payable to the Federal Reserve Bank and elsewhere, and it was known to me at that time that there was a growing uneasiness among depositors of the National Bank of Kentucky, particularly among country banks. I anticipated rather active withdrawals. The elements of potential danger were in effect that the officers of the bank admitted that they had only approximately \$4,000,000 of paper that was eligible for rediscount at the Federal Reserve Bank, and that in my judgment, practically none of these large concentrations of credit which I discussed under American Turf and Banco Kentucky would be available as collateral with the Federal Reserve or correspondent Banks. I thought they were just before being in trouble.

The Directors promised at the meeting that they would attempt to borrow \$1,000,000 and use that money for the benefit of the bank. An additional \$600,000 loan was concluded with the Chemical Bank and Trust Company of New York and deposited to the credit of the Banco Kentucky Company, on the books of the National Bank of Kentucky. The \$580,000 Murray Rubber Company debentures and \$20,000 of the Lewis Humphrey notes were purchased from the bank. I made an effort to get the worst items out of the bank with that available cash and that was the way I regarded those two items.

Cross-examination by Mr. Crawford

The examination of the bank started on September 17. Examiner Mooney began the work and I arrived on September 22, 1930. Prior to that time except from what I had seen in the Examiner's reports I knew nothing about the

Robert Neill—Cross

bank except its general reputation. It was reputed to be one of the outstanding banks of the South. I had been in the banking business a great many years and knew that that was its reputation. I first talked to the directors on October 8. Later, I testified about this meeting with the directors in the suit of *Keyes v. Akers* and everything that I have testified to here I also testified to in that suit. I may have elaborated some in this case.

The bank was on a quarterly dividend payment and prior to my examination the last previous dividend was paid in June. The dividend amounted to \$160,000.00 and was declared June 1, payable July 1, 1930. I think I knew before I left the bank that they declared another dividend while I was examining it. This one was payable on October 1. It was declared on September 19, 1920. My initials appear on the minutes of the meeting of that date indicating that I read those minutes on September 25.

At the meeting of October 9 I called the Board's attention to the Wakefield & Company item and stated that the lending officers had put in something. Other than Brown and Jones I did not mean the directors when I made this statement and I did not mean the non-officer directors. I found out that many things had been concealed from them.

"Q. You particularly referred to the item that had been put in the bank by the officers, did you not, for the purpose, in your opinion, of deceiving them?

A. The report speaks for itself, I think—yes.

Q. You referred to the Van Camp purchase; in your picturesque language you thought that had been bootlegged through, or was that Caldwell?

A. That was the Southern Banks?

In other words, that had been done without any authorization, or against the express authorization of the Board of Directors at that time?

A. Correct."

The Wagon Company had been theretofore disposed of and stock taken and that was referred to in the investment account. So far as I know the Van Camp stock purchase was unknown to the directors. I wrote the letter signed by the directors dealing with the \$242,500.00 loss in Van Camp Packing Company stock which was added to the carrying value of Banco Kentucky Company and charged to undivided profits account, thereby creating a deficit in that account.

The directors agreed to take out the \$580,000.00 Murray Rubber Company debentures. They didn't say anything about that being bad in their opinion, they just agreed to take it out. The Murray Rubber debentures and the Humphrey loan were taken out by Banco and the bank actually got \$600,000.00 for these items.

With the exception of the Murray Rubber Company and the \$265,000.00 joint note all of this \$200,000 or \$2,400,000 on Inter-Southern stock and Caldwell associates—the Caldwell loans—were made within six months prior to the suspension. Two of them amounting to \$600,000 were made during the course of the examination without the knowledge or consent of the directors. The others were made within four months prior to that time.

Inter-Southern stock had been selling for something like \$3.00 a share. At that price they had enough Inter-Southern stock to cover the loans, assuming that the maker was bad but that was higher than the current quoted price on the date of my examination. It might have been around that figure just before the examination. After the bank closed it was sold for more than \$2,000,000 with the result of a million dollar loss to the bank.

I never examined the Norman Company but I concluded that that was a bad item from the information in the files

Robert Neill—Cross

of the bank and conversation with Akers and others. It was with reference to this item that Mr. Brown said:

"That was a mighty poor defense on that."

I considered this as a tacit acceptance of my estimate.

The bank borrowed as much as eighteen million dollars and continued to operate. At the start of the examination they were not borrowers from the Federal Reserve Bank but they did borrow before they closed. The preceding year they had been borrowing very large amounts.

The bank had up to \$50,000,000 of deposits but they were not that high at the time of my examination. It was a large bank from the point of view of the number of people employed. They had an extremely active business—very many transactions.

The bank had eight Vice Presidents in charge of separate departments, some of them overlapped. Correspondence was very large. I never went into the correspondence files to find out anything about the bank.

The Comptroller's officer prepares forms under which the examiner would make a report of dividends. Prior to and within ten days of a declaration of a dividend the law requires the Cashier of a bank to make a sworn statement to the Comptroller. Such a statement had been made on July 10, 1930, with respect to the June dividend. This report set out the capital, surplus and undivided profit. The bank had a capital of four million dollars. Its surplus was two million and on top of that it had undivided profits which were reflected by reserves.

The dividend paid on July 1 was \$160,000.00 and I undoubtedly found the notification that the cashier made under oath to the Comptroller. This showed that the dividend was paid out of undivided profits; leaving something in that account and the two million dollar surplus and the four million dollar capital.

Robert Neill—Cross

In addition to this particular report there is usually a semi-annual report sent to the Comptroller of earnings. My report shows that such a report had been sent to the Comptroller on July 10 as of June 30, 1930. This report shows a capital of four million dollars, surplus two million dollars and net undivided profits at the close of the period \$166,835 after the payment of the dividend that had been declared.

Defendant offered in evidence this report as defendant's Exhibit 1.

W. T. ZurSchmiede was cashier of the bank. A dividend of \$160,000.00 was declared on September 10 and there was a report to the Comptroller of the status of the bank for the purpose of ascertaining its ability to properly pay the dividend. That report shows capital stock paid in—\$4,000,000, surplus fund \$2,000,000.00, net earnings on hand at date of declaration of dividend (including earnings of this period and balance of earnings remaining from previous periods) was \$310,554.80, less bad debts on hand as defined by section 5204, Revised Statutes, \$32,938.00; net earnings available for dividend, \$277,616.80; amount of dividend declared (4% on capital) \$160,000.00; and net earnings available in excess of dividend, \$117,616.80. This report was offered in evidence as defendant's Exhibit 2.

I did not approve this dividend payment. I made no mention in the report of examination of this particular report of earnings but I did not formally criticize it. I did criticize the dividend policy in my report at page 11-6 where I said—"Attention of the Board is directed to the statutory inhibition against the payment of dividends unless the undivided profits of bank exceed by the amount of the dividend the amount of statutory bad debts owed by the bank at date of declaration of dividend. As a matter of conserving earnings to provide for losses, a reduction

Robert Neill—Cross

in the present dividend rate of 16% per annum should be given serious consideration by the board of directors."

I was talking about the future policy of the bank and made no mention in that statement about the dividend that had been paid. I do not remember whether I discussed this question whether the dividend violated the law with the Board of Directors and I did not testify criticizing the dividend in my testimony in the case of *Keyes v. Akers*. From my point of view the dividend was paid with known losses and was illegal. I was more interested in saving the bank than in filling my report with criticism. I had a very deepseated fear that the bank might close and I told several people of that fear.

"Q. I will ask you if the bank was not solvent on the day before it closed?

A. In my judgment that is true.

Q. I will ask you if this question wasn't asked you and this answer wasn't given in the case of *Venhoff & Hillen v. Paul C. Keyes*, in this court, when your deposition was being given March 7, 1931: 'I will ask you to tell us what was the expectation of the bank officials, including yourself, as to the opening of the bank on Monday after its close of business November 15th?' And your answer follows: 'There appeared to me to be a fairly good opportunity for the bank to reopen Monday morning until after eight o'clock Sunday night.' Was that true?

A. That was an optimistic view.

Q. What is that?

A. In retrospect that appears to be an optimistic view.

Q. I am not talking about retrospect.

A. Certainly the morning of the 15th we were making every effort, the officials of the bank, over Sunday, in an effort to save it. I hoped to put that over, but it didn't eventuate."

Robert Neill—Direct

The big blowup in the stock market occurred October 24, 1929 and to some degree it caused a big change in the asset value of nearly everything.

On the 5th of November I saw a great deal in the newspapers concerning the Caldwell failure. Following that publication, \$12,000,000. was withdrawn from the Bank of Kentucky between that time and the time it closed.

 **Robert Neill,**

recalled for the Plaintiff, testified:

I used the word "solvent" in my testimony regarding the condition of the Bank on the Saturday previous to its close in the sense that the entire capital structure had not been then exhausted or surpassed by known losses. Under that definition if there was one dollar of capital left, the bank would be technically solvent. However, a bank might be practically insolvent when its capital structure was merely impaired but the withdrawal demands were such that it could no longer meet those demands. Refusing to meet demands is, in itself, an act of insolvency.

Q. When a bank's cash is exhausted and its borrowing power is gone, and it is unable to meet the demands made upon it from the standpoint of a bank, as a banking definition, state whether or not in your opinion that bank is insolvent?

(The objection to this question sustained and answer taken as an avowal.)

A. About the best reply I could give there is that under those conditions the directors usually vote to suspend.

On the last day the bank did not have enough cash to meet their clearings, except for the last emergency loan of \$690,000.00 from the Federal Reserve Bank on Saturday, the 15th of November. The term "exhausted" with refer-

Robert Neill—Direct

ence to the cash of a bank is a relative one. Actually, from the books as of close November 15, there was some cash left on hand. I do not remember the exact amount. Probably in excess of \$1,000,000.00. From a practical standpoint, on the final Saturday they were not able to meet their clearings with their own cash. Their borrowing power capacity was exhausted and that was very definitely tested by the extreme effort it took to talk the Federal Reserve Bank out of the last \$690,000.00 loan on November 15. I participated in that discussion. The Federal Reserve Bank doubled the collateral requirement practically over night. It was insurmountable. The National Bank of Kentucky did not have the type and kind of collateral satisfactory to the lender to collateral the loan that they were asking.

Prior to the consummation of this \$690,000.00 loan a request had been made by two of the directors of the National Bank of Kentucky of the two senior officers of the First National Bank and Citizens Union National Bank of Louisville, asking them to make the National Bank of Kentucky a loan in the emergency, and while those officers did not refuse, they assumed the position that the natural source of supply was the Federal Reserve Bank, and Messrs. Gifford and Downing participated in the telephone conversations with the head of the Federal Reserve Bank of St. Louis which resulted in the final consummation of this \$690,000.00 loan. I can't say they were completely turned down by these other banks.

The regular closing hour of the Louisville banks on Saturday is one o'clock, so after one o'clock there was a series of meetings held in which a representative of every bank in Louisville—the Clearing House Association, as a matter of fact, participated. At that meeting it was determined that an examination of the assets of both the National Bank of Kentucky and the Louisville Trust Company would be

Robert Neill—Direct

made by representatives of the clearing house banks, other than the National Bank of Kentucky.

Those present included Downing of the Citizens Union, and Wirgman of The Fidelity and Columbia, Noel Rush, President of the Lincoln, John Hühn, President of the Liberty, and representatives of the Security Bank; Mr. Richard Bean, President of the Louisville Trust Company, Jones, ZurSchmiede, director William Speed, and others of the National Bank of Kentucky. Mr. John T. Barr, a director of Citizens Union and Fidelity and Columbia Trust Company, and other representatives of other little banks in Louisville also participated. It was a clearing house meeting participated in by all its members. Both officer and non-officer directors of Louisville Trust Company and the National Bank of Kentucky were present.

They appointed committees to examine the two banks. Mr. Noel Rush headed the committee of examiners who went into the Louisville Trust Company, and Messrs. Gifford, Downing and Cobb came over to the National Bank of Kentucky that night with a number of their junior officers, whose names I do not now recall. Of course, the actual research into the records of the National Bank of Kentucky, where I participated—I was not at the Louisville Trust Company that night—that was done by these juniors. Mr. Gifford and Mr. Downing stayed there until long after midnight, and the balance of us worked all night and reported back to the Clearing House Committee Sunday morning.

There were discussions all Sunday morning of possible plans, and we worked all afternoon and adjourned for supper, and the final conclusion was that the clearing house bank would do nothing. In fact, while we were at supper each of the banks prepared ads to go into the newspaper the next morning in anticipation of the suspension of the Na-

Robert Neill—Direct

tional Bank of Kentucky. The bank had exhausted its resources.

At various times during Sunday there were probably as high as 100 people present. It seems that officers and directors of all the banks came in and, also, a number of citizens. Mr. Whiteford Cole, President of the L. & N. Railroad was among those there. The committee worked all night Sunday and found both banks insolvent—the National Bank of Kentucky in excess of \$1,000,000.00.

I reached the conclusion that the bank would have to suspend at the time I was making my examination. This was approximately one month before the bank closed and prior to the withdrawal of the \$12,000,000.00 following the failure of Caldwell. I was led to that conclusion by the general unsatisfactory condition of the bank's assets and the well-established fact that there were abroad rumors of all types and descriptions as to the condition of the National Bank of Kentucky that tended to create unrest in the minds of the depositors, leading to the mail and clearings run which I mentioned yesterday.

Q. I want to ask you whether or not in your opinion the causes which brought the ultimate collapse and failure of the National Bank of Kentucky were due to the depression, or whether they existed in this bank prior thereto.

(Defendant's objection was sustained and the answer was taken as an avowal.)

Undoubtedly the stock market break in New York in October, 1929 adversely affected all listed securities. I was examining banks in that territory at the date it occurred, and I very well remember the conditions. However, the amount in volume of loans in the National Bank of Kentucky predicated on listed stocks was relatively small and there was no visible effect—in my judgment there was no visible effect on the securities behind these large concentrations as a result of the stock market crash.

Robert Neill—Direct

Plaintiff offered in evidence as Exhibits 150-1 to 150-12 signed statements by the cashier of the bank from April 13, 1923 through August 23, 1929 acknowledging receipt of report of examination and that the same was submitted to the Board of Directors, considered by them and record of action taken made upon the minutes.

Witness was then asked about a summary of reports which he had made.

(Objection to this question was sustained and his answer taken as an avowal.)

This is a list I prepared yesterday from the reports of examination of the bank as of May, 1929 by Mr. John S. Wood. At that time—as of that date, I should say, the Kentucky Wagon Company debt had a book value of \$1,340,474.00, and there had been previous charge-offs on this debt of \$650,000.00, so the bank's total investment in the Kentucky Wagon Company obligations amounted to \$1,990,474.00. The Murray Rubber Company obligations in full, including debentures and rediscounts as of that date amounted to \$1,101,720.00. E. B. Norman & Company owed the bank direct and indirect obligations of \$552,871.00. The Wakefield & Company line, including accommodation notes, aggregated \$1,190,000.00, and the Campbell-Van Camp line amounted to \$1,073,000.00. The total of those five lines aggregated \$5,908,065, an amount which approximated the capital and surplus of the bank according to the books of the bank of that date..

Q. You have not even listed the smaller items?

A. No, sir.

(The following statement was also accepted as an avowal.)

When I examined the bank I did not find the Kentucky Wagon Works item listed. It had been ostensibly traded for 100,000 shares of Banco. All of the items representing

Robert Neill—Direct

the indebtedness of the Wagon Company were credited off the books and then a lump sum was debited to the bond account—\$1,676,150.00—as the carrying value of 100,000 shares of Banco stock. They transferred the Kentucky Wagon Works losses off the books, but set them up as an asset in their own holding company. They set up a similar amount as the value of the Kentucky Manufacturing Company on the books of BancoKentucky Company. This transaction is referred to in my examination, as in my opinion, a “wash” transaction or a “wash sale.” It was the exact amount of the carrying value of the debt, but there had been \$700,000.00 previously charged off.

(The preceding statement made as an avowal following the sustaining of objection to question on Mr. Neill’s summary from the reports on examination.)

The Murray Rubber loan was carried at \$580,000.00, which was the par value of the debentures. They were wholly unsecured. It was this item that was sold to the BancoKentucky Company for the same amount. The collateral behind the Lewis Humphrey note was Herald-Post stock, which only had a nominal value, if any.

The directors present at the meeting which I held included Mr. Akers, Mr. Angermeier, Mr. Brown, Mr. Callahan, Mr. Carroll, Mr. Clarke, Mr. Coons, Mr. Duncan, Mr. Durham, Mr. Hayes, Mr. Sanders P. Jones, Mr. Charles F. Jones, Mr. E. J. O’Brien, Mr. Ormsby, and Mr. Speed the first day only; he left on the night of the first day and went to Chicago on a business trip and was not there the second day—and Mr. Vogt. If my memory serves me right, Mr. Sanders Jones attended only one of those meetings, and that probably applies to Mr. Durham, the Vice-President of the Franklin Title & Trust Company.

In the report of examination made by me reference is made to prospects of a merger between the National Bank

Robert Neill—Director

of Kentucky and Louisville Trust Company, and in that report I pointed out that inasmuch as the two corporations were to all intents and purposes 100% owned by the Banco-Kentucky Company, it would prove easy of consummation. I was assured that this merger was in good faith in process of consummation and that on consummation, paper in the bank would be eliminated from its assets, and for this reason a more liberal classification of loans was made than would have otherwise have been made. On pages of the report there is a list of loans on stocks of Banco-Kentucky Company and the American Turf Company. In a heavy percentage of those items, running into scores of loans, the estimated market value of the stock was less than the face amount of the loan. Yet, with a few minor exceptions, I did not on any of these loans carry any part of that collateral shortage into the doubtful or loss column. It was on the basis of that classification that I answered Mr. Crawford's question with reference to my opinion of the solvency of the bank.

Every officer and director whom I contacted during the course of the examination informed me that they were going to have this merger. This included Mr. Brown, Mr. Jones, Mr. Speed, Mr. Callahan, Mr. Coons, Mr. Duncan, Mr. Durham, Mr. Vogt and others. It was included in a letter to the Comptroller in which they said that project was in prospect. This letter is signed by James B. Brown, Anthony J. Carroll, Sanders P. Jones, S. E. Duncan, Henry Vogt, George M. Clarke, Mr. Ormsby, J. J. Hayes, J. S. Akers, H. J. Angermeier and C. F. Jones, and all the non-director officers of the National Bank of Kentucky at that time.

I wanted to avoid a drastic charge-off necessitating a reduction of the surplus account in order to stabilize the position of the bank. I did not want to precipitate any

Robert Neill—Cross

action that would have an adverse effect on the bank. The publication of reports of condition showing a reduction in the capital structure would cause the natural inference that it was occasioned by charge-off of losses and it would have further disturbed the minds of the depositing public in the Louisville area and customers of this bank if a stricter classification had been made resulting in a requirement for further charge-offs.

The combined deposits of the two institutions at that time would have approximated \$50,000,000.00. In my opinion this would require a capital structure of \$5,000,000.00 and inasmuch as the combined capital structures of the two institutions aggregated between \$9,000,000.00 and \$10,000,000.00, such a merger would have released between \$4,000,000.00 and \$5,000,000.00 to take out sub-standard assets. The promised merger was never made.

Cross-examination by Mr. Crawford

The Lewis C. Humphrey note in the sum of \$27,734.74 was collateralized by 765 shares of Herald-Post common stock. At that time the Herald-Post was one of the leading papers in Louisville and was regularly operating. I examined into its value and we considered it of most questionable value. There were a great number of loans on Banco and American Turf by a great many different people. We examined the worth of the makers of that paper, but not all of them. The source of the information was in the credit files of the bank, plus such information as we could get from the officers deemed to be credible. We did our best to establish the outside holdings of Charles F. Jones, Vice-President, W. T. ZurSchmiede, Cashier, W. P. Kincheloe, who was in the Trust Department, Catherine Mooney, who was an employee of the bank and Stanley Reed, Wakefield and Company. The nightwatchman of the bank had a big

Russell Mooney—Direct

loan with Banco on it, and we tried to determine his worth. We made no effort to determine each individual's worth over and above the estimated value of the collateral.

Redirect Examination by Mr. Marx

Prior to the stock market crash in October of 1929 we were in the peak of an expansion period. It was a period of prosperity.

Colonel C. C. Mengel was ill during the months of October and November, 1930.

Plaintiff offered as Exhibit 151 the agenda referred to in Mr. Neill's testimony. It was admitted in evidence. Plaintiff also offered the summary made by Mr. Neill from the examination reports, which was marked Exhibit 152 but was not admitted by the court.

Russell Mooney,

called for the plaintiff testified:

I am Vice President and Director of the National Bank of Commerce in Memphis. Prior to July 20, 1933, when I took my present position I was a National Bank Examiner with offices in St. Louis. I served in this capacity for 5½ years and examined on an average of fifty national Banks a year.

I examined the National Bank of Kentucky beginning December 30, 1929 and concluded the examination on January 11, 1930. Under statutory provisions a national bank is required to be examined twice a year. In the ordinary course of examination, the bank would have been up for examination in September or October of 1929, but in view of the preparation and announced intention of the National Bank of Kentucky to surrender its charter as a national bank, the action of examining the bank was postponed, in the hope or in the thought that perhaps it might be com-

Russell Mooney—Direct

pleted before the end of the year, and the second examination in 1929 would not be necessary. If the bank had surrendered its charter no examination would have been necessary.

They did not go through with their intention by December and we commenced our examination on the 30th of that month. I was a resident examiner and had an office in the Federal Building at Louisville. I called at the bank some five or six times during the months of October and November to determine what progress they were making in completing the denationalization. They advised me that the stock market collapse had caused them some trouble about effecting a sale of their stock and that they were going to have to postpone it temporarily.

I made my examination and prepared one copy. Five copies were then prepared in the Chief Examiner's office, one of which was sent to the bank. Witness then identified Exhibit 18 as the report of examination which he made.

I have never testified in any previous case concerning the National Bank of Kentucky. I took part in six or seven other examinations of that bank from 1925 to 1930, first as assistant examiner and later as examiner.

I received the letter written by the Chief National Bank Examiner on May 19, 1930, and following the receipt of the letter I went to the bank on the date mentioned. The Murray Rubber Company line had not been taken out or charged off in full by September 1, 1930, nor had the Lewis C. Humphrey note been collected or taken up. I discovered that the Kentucky Wagon Company line, amounting to \$1,576,569.67, had been taken care of by the sale to Banco-Kentucky Company of all the claims that the National Bank of Kentucky held against the Wagon Company, Banco paying for this claim by issuing to the National Bank of Kentucky 100,000 shares of stock. These 100,000 shares

John S. Wood—Direct

were written up in the same amount as the Kentucky Wagon Manufacturing Company indebtedness plus \$200,000.00 of uncharged off loss sustained in the Van Camp Packing Company sale. I found that the 100,000 shares of Banco had been written up on the books of the bank for the same amount as the Van Camp Packing Company loss and the Kentucky Wagon Manufacturing Company item. I notified the Chief Examiner in St. Louis and recommended an immediate examination of the bank. Mr. Neill came and the examination began.

(Defendants waived cross-examination of Mr. Mooney.)

John S. Wood,

called for the plaintiff, testified:

I have been Vice President of the Federal Reserve Bank of St. Louis for about 2½ years. Prior to that time I was Federal Reserve Agent from June 1, 1930 to April 30, 1936. Before that I was Chief National Bank Examiner of the Eighth District for 10 years and I was a National Bank Examiner before I became Chief Examiner. I have been in banking or some phase of supervision all my life since I left college in 1892. I have participated in or supervised the examination of a good many national banks in various parts of the country and in my capacity as Chief National Bank Examiner I made or caused to be made examinations of the National Bank of Kentucky.

That bank was examined twice a year. Witness identified Exhibit 14, the examination beginning October 14, 1927 and concluded October 29, 1927. A copy of this examination was sent to the bank. Exhibit 16 is a correct copy of the report of examination of the National Bank of Kentucky, commencing on October 13, 1928 and concluded October 27, 1928. A copy of this examination was sent to the bank. The exhibit is a true and correct report of the condition of the bank as I found it on my examination.

John S. Wood—Direct

Exhibit 17 is a true and correct report of the condition of the bank as I found it on my examination commencing May 25, 1929, and ending June 15, 1929. A copy of the report was sent to the bank. Exhibit 19 is a true and correct report of the condition of the bank as I found it in the examination beginning April 26, 1930 and ending May 9, 1930.

The National Bank Examiners working under me had a commission from the Comptroller of the Currency. They report to me. One of those examiners was W. W. Kane, Jr.

Exhibit 15 is the report of an examination by Mr. Kane, commencing on March 9, 1928 and concluded March 31, 1928. I was in Louisville during the time of the examination and the examination was made under my general supervision. After the examination was completed a copy was sent to me and additional copies were prepared. The examiner sent an authorization authorizing the Chief Examiner to sign and I as Chief Examiner signed it.

Vance L. Sailor was a National Bank Examiner and Exhibit 13 is a report of examination of the National Bank of Kentucky for the period beginning April 23, 1927 and ending May 12, 1927. The examination was made under my general supervision. Copy of the report was signed by me and sent to the bank.

I made an examination of the bank just a few weeks before Banco Kentucky was organized. The report of that examination is Exhibit 17. It was represented to me that a holding company would be organized. The matter was discussed at some length at an officers meeting. Brown, Akers, Angermeier, Bart Brown, Dugan, Green, Hayes, Jones, Ormsby, Robertson and ZurSchmiede were present.

Defendant's counsel moved that the testimony be stricken in regard to any one not present, which objection was overruled.

John S. Wood—Direct

It was the general consensus of opinion of those present at the meeting that the holding company would acquire through a term of years and work out certain assets of the bank, among others, the Kentucky Wagon Manufacturing Company.

The next examination was made by Examiner Mooney (Ex. 18). That began at the end of December, 1929, and was completed in January of 1930. The examination in May of 1930 was made by me. At that time Banco Kentucky Company had been organized. A meeting of the Board of Directors of the bank was held at that time primarily because instructions had been given by the Comptroller of the Currency that it must be held. The meeting took place on May 16, 1930.

Q. Tell us what you did with reference to this particular meeting and what you said?

Objection was sustained and answer was received as an avowal.

I went before the Board about 3:30 on May 16, 1930 and stayed until 5 or 5:30. I discussed with the Board the Kentucky Wagon Manufacturing Company item, reading to the directors that the total amount of the Kentucky Wagon Manufacturing Company indebtedness to the bank was \$1,576,569.67. I had with me when I appeared before the directors original notes and work papers prepared by me in the course of making my examination of the bank, and subsequently used by me in drawing up the report of my examination. I did not read to the directors the entire record appearing in such work sheets, and later appearing in my report of examination, but with respect to the Kentucky Wagon Manufacturing Company item I read to the directors from the work sheet I had with me the following:

"On the basis of the figures in the statement, the company would appear to be reasonably good but the figures

John S. Wood—Direct

evidently do not represent sound values. The fixed assets have been discussed repeatedly heretofore. They consist of thirty-two acres of ground, adjoining two railroads, with a number of factory buildings. The value is problematical as the bank has never had a firm bid for the property.

The statement shows under Current Assets, Finished Stock and Work in Process \$1,120,932.63, Raw Materials and Supplies \$786,969.80, making a total inventory of \$1,907,902.43. Operating figures were not given as 3/31/30, but on July 31st, 1929, the figures shown by the books of the company are: Finished Stock and Work in Process \$1,087,387, Raw Materials and Supplies \$742,520, total \$1,829,907.

The operating details show gross sales \$946,248.04. These figures will not 'stand up.' That the inventory should be approximately twice the amount of the annual sales is an operating abnormality that cannot be explained. It is true that a portion of raw material consists of old parts inherited from the two predecessor companies, but the finished produce and work in process cannot be explained away on this basis. It is noted that this item alone is sharply in excess of the annual sales.

It does not require an analysis of the statement of the company, however, to reveal the deplorable condition that exists. On 11-7-25, the line amounted to \$1,164,896.85. Since that time, \$700,000 has been charged to Profit and Loss on account of this line. In spite of this fact, however, the line has increased to \$1,576,569.67. In other words, after charging \$700,000 to Profit and Loss, the line is \$411,672.82 greater than it was at the time the first charge-off was made. This shows a total increase of \$1,111,672.82. This increase cannot be accounted for on any reasonable basis.

The company is habitually overdrawn. The following figures may be illuminating. There have been overdrafts

John S. Wood—Direct

of the company that have been periodically covered by notes, as follows: 12-31-28 . . . \$191,000; 6-29-29 . . . \$159,000.00; 10-2-29 . . . \$83,000.00; 12-31-29 . . . \$46,123.00.

The management of the company continues to increase the amount which this bank is advancing to the enterprise, and apparently the management of the bank is unable to restrict these advances. The result has been a real tragedy to the bank, which has found expression in the \$700,000 already charged off and the additional loss that at this time appears to be resident in the asset.

Twice in recent years, it has appeared that the bank had a chance to dispose of the property on a basis that would result in substantial recovery. No doubt if the company could find an enterprise whose operations could be so adjusted so as to use the fixed assets of the company, the property could be disposed of at a good price. No prospect is in evidence at this time."

Prior to the reading to the directors of the foregoing comment, I discussed the Kentucky Wagon Manufacturing Company item with the directors and told the board that in view of the history of the asset and the improbability of any sale being consummated, I would ask them to have the line taken out of the bank, either by charge-off or by purchase. There was considerable discussion, the statement being made that it would be difficult to take the asset out of the bank immediately.

After I read my comments there was a discussion with reference to the comments and it was agreed between me and the directors that the Kentucky Wagon item would be taken out of the bank prior to September 1st, 1930, either by charging it out of its assets entirely or by sale of the asset by cash. I recall a number of comments made by directors with respect to the value of the land, one director stating it was a very valuable property and that he

John S. Wood—Direct

estimated the value per acre by feet and arrived at a valuation of \$10,000 per acre and said that that would make \$3,200,000 and then there was a pause for a moment and another director spoke up and said no, it would make \$320,000. The director who made the first statement was director Clarke. I was told that the director who made the second statement was director Speed.

When I read the amount of the Wagon Company item as \$1,576,569.67 I do not recall that any director expressed surprise at that being the amount of the item as it stood on the books. No director asked Brown at that time whether that was not a mistake—whether the amount was not substantially \$500,000.

When I mentioned the fact the company had been badly overdrawn and the notes had been taken for the amount of the overdraft, there was some discussion about the overdrafts, but no director charged Brown with concealing anything in reference to the overdrafts. No director asked Brown why he hadn't informed them of the facts reported by me relating to charge-offs of \$700,000 and overdrafts allowed to the Wagon Company or made any charge of concealing such facts.

I read the following from the report concerning the Murray Rubber Company line.

“Under the caption Murray Rubber Company. This is described under ‘Large Lines.’ The first item is W. T. Campbell, \$47,872.91 secured by \$50,000 Murray Rubber Company bonds. W. M. Pepper, \$47,802.91 secured by \$50,000 Murray Rubber Company bonds. Murray Rubber Company bonds held as an investment \$580,000.00, note of Rogers Caldwell secured by \$295,000 Murray Rubber Company bonds and \$265,000 cash item Murray Rubber Company bonds, \$265,000 cash item \$1,797.47, Murray Rubber Company direct \$344-

John S. Wood—Direct

680.29, Murray Rubber Company trade acceptance \$68,146.92, total \$1,355,230.51."

I told the directors that the Murray Rubber Company line had been getting progressively more unsatisfactory. Brown said that Murray Rubber Company had been a losing proposition steadily for several years and called their attention to the fact that he had received advices that the figures for operations for April would show a small profit and that the plan of distribution that had been adopted by the company was accelerating the sales to such an extent that he thought in a few months it would be in shape so that they could reorganize it and it would be taken out of the bank. He stated the profitable operation was all that they needed as a basis for reorganization.

I asked that the Murray Rubber Company item be taken out of the assets of the bank. Brown stated that the May operations would show such profits that it would be possible to take it out by September 1st. It was agreed that the item would be taken out of the bank by September 1st.

No director expressed surprise at the item of \$265,000 and the item of \$580,000 read by me as a part of the Murray Rubber Company line of indebtedness. No director made any inquiry of Brown as to whether there was not some mistake about some items.

The Van Camp Packing Company stock item was mentioned to the directors.

I had with me a list of items which I asked to be charged off of the books of the bank, and among such list were loans to Lucas, Fields and Humphrey. It was in connection with the reading of this list of items that the Lucas, Fields and Humphrey loans were discussed by me with the board.

I began reading the list of charge-offs as follows:

John S. Wood—Direct

"David Baird, \$10,000.
 Chester D. Clark, \$90,000.
 L. J. Dittmar, \$3,359.30.
 Eureka Products Company, \$4,000.
 Lee P. Path, \$475.55.
 Dora and W. J. Fields, \$6,000.
 Also H. R. Hodapp, \$100."

After having read several small items there was some director suggested it would not be necessary to read all the small items and suggested that we not take up any items that were below a certain minimum. I am not entirely sure of what that minimum was, but I think it was \$1,000. I know that some of these \$50.00 and \$500.00 loans were not read but just where that began and which ones of the small items were omitted, I do not recall. There were several items that as the result of our discussion, the classification was changed and the items were not desired to be charged off.

After the suggestion of the director that items of less than \$1,000 be not read, items of charge-off were read or not read by me from the list before him as follows:

Louis P. Hyman Company, \$6,500 was read.

Thomas Jefferson Memorial Fund, \$500, not read.

H. P. Lutz, not read.

Kentucky Wagon Manufacturing Company \$476,569.67, read, but charge-off not required because the directors agreed to eliminate the item from the assets of the bank by September 1st.

Knadler & Lucas, \$25,000, read.

Mr. and Mrs. R. R. Maxwell, \$30.61, not read.

Sam B. Metcalf, \$152.25, not read.

Mrs. H. L. Middleton, \$300, not read.

Murray Rubber Company, \$500,000, read, but not required to be charged off because of the agreement that

John S. Wood—Direct

it would be taken out of the assets of the bank by September 1st.

Norma Newhouse, \$100, not read.

George R. Newman, \$680, not read.

S. G. Rosenfeld, \$52.50, not read.

Shapin Mfg. Company, \$41.52, not read.

Simpson Realty Company, \$600.00, not read.

C. A. Singer, \$2,953.79, read.

E. R. Thomson, \$2,004.80, read.

Alvin Wells, \$238.80, not read.

W. C. Wright, \$181.07, not read.

W. C. Young, \$1,680.00, read.

Van Camp Packing Company, \$128,096.54, read, but not required to be immediately charged off, because, after discussion, it was agreed that the bank would have until July 15th, 1930 within which time to sell stock and charge off the loss, if any.

Stella Van Dyke, \$1,092.00, read.

Then a group of stocks comprising International Planters Corporation, Louisville Railway Company, common, L. H. & St. L. preferred, Rich Patch Land Company, Industrial Ownership Corporation, carried at \$115,000 on the books of the bank, of which \$51,225 was listed for charge off on account of such stocks, read.

Badger Aluminum Company, \$212.52, not read.

Then certain items were read under the heading "Claims and Judgments," one item of Peoples Bank of Springfield, Tennessee, \$12,433.25, and another item of the same Bank, \$675.18, read.

Under the same heading of Judgments and Claims, Graphite Products Company of Delaware, \$616.50, not read.

Then there were twenty-five small overdrafts aggregating \$66.38, not read.

John S. Wood—Direct

Other real estate aggregating \$7,850.04, read.

Then there were sundry cash items of \$102.80 that were not read.

As I read the items for chargeoff, there was discussion about certain items as a result of which I changed the classification of certain items from loss to doubtful and assented that immediate charge-off would not be required. One of such items was the Lewis C. Humphrey item of \$27,737.74, as to which immediately charge-off was not required because of the representation of Mr. Brown that he would see to it that the item would be taken care of. Another of such items was the item of Robert H. Lucas, on which a partial loss of \$4500.00 was then estimated, and as to which immediate charge-off was not required because of the assurance of Mr. Brown that there would be monthly payments of \$250 made on such loan.

The Humphrey and the Lucas items were the only items as to which charge-offs were not required in the whole list of charge-offs above mentioned, except the items of Kentucky Wagon Manufacturing Company, Murray Rubber Company, and Van Camp Packing Company, as to which special arrangements were made as mentioned.

It was agreed that all other items, the items not read as well as the items that were read, would be charged off immediately.

After disposing of the matter of charge-offs I read my list of criticisms which now appear on page 11-2 of my report of examination. In the reading, however, I inadvertently omitted criticism number 8 and did not read criticism number 10 because such criticism was not on my sheet at that time because the date was not then at hand.

I read: Criticism 1, Judgments and overdue loans, described on Page 4 and supplemental pages. Criticism 2, slow and doubtful loans described on Page 4 and supple-

John S. Wood—Direct

mental pages. Criticism 3, losses described on pages 4, 7, and 8 and on pages supplemental thereto; Criticism 4, other loans especially mentioned and described on page 6 and supplemental pages. Criticism 5, overdrafts in the bank amount really to a vice in the management. The large amount of overdrafts the bank has to show in public statements are believed to be disadvantageous to its best interests and the fact that some of the large loans are carried by concerns in which the directors are interested is believed to be the subject of definite criticism. See Page 8 of the report. Criticism 6, criticized items described under stocks, miscellaneous mortgage bonds and claims and judgments described on Page 7 and supplemental pages of the report. Criticism 7, relating to the illegal purchase of the Van Camp Packing Company stock. Criticism 9, the large amount of loans on stock of BancoKentucky Company may be open to question as to its legality. The largest single asset BancoKentucky has is the stock of the bank. The loans secured entirely by stock of BancoKentucky Company amount to \$2,543,804.38, and comprise 132,542 shares. I recall that I read only the general total of BancoKentucky Company loans, aggregating loans secured in whole or in part by BancoKentucky Company stock, \$5,791,798.92 and comprising 238,427 shares.

In connection with reading the first four criticisms relating to criticized loans, I stated at the meeting that I had my notes on all of such loans present with me and would be glad to read my comments on any or all of the loans if the directors would take the time to hear it, but that it was hardly practical at that time to read them all and accordingly I urged the directors to have a committee appointed to go into my report of examination, showing the detailed loans, carefully. In connection with my reading of criticism 5 relating to overdrafts, I read to the directors overdrafts

John S. Wood—Direct

as follows: Kentucky Wagon Manufacturing Company \$84,864, Herald-Post Company, \$2,534.91, which on May 3rd, 1930 had increased to \$32,503.76, Ben S. Washer, \$9,995.10 which had begun on January 17, 1930, and Knadler & Lucas \$11,124.98. I read my comments on overdrafts as follows: The total overdrafts of this bank at the time the examination began were \$133,584.77. This amazing total when shown in public statements makes a very undesirable public gossip. The publication cannot result in any benefit to the bank.

In connection with my criticisms of the loans on Banco-Kentucky Company stock Brown stated that a market would be established for the stock at above 25, that when negotiations with the brokers were finished the brokers would buy Banco-Kentucky Company stock and would support the market for it. He stated that he had been in negotiation with Caldwell & Company to buy an interest in Banco-Kentucky Company.

Near the end of the meeting with the directors Speed asked:

"Mr. Wood, are those assets that you have discussed all of the assets in the bank that are subject to criticism?"

I replied: "By no means," and called attention to the fact that my comments on the loans which were criticized were typewritten and that I would be glad to read the list to the board if the directors thought it practicable to give the time to read it all and urged them again to have a committee examine my report when it was made available and report to the directors.

After the meeting was over, within thirty to forty-five minutes thereafter, I dictated a letter to Mr. S. H. Mann, who was then a national bank examiner and who had been a stenographer, covering the items that the local examiner should check up on or at the proper time should see that the

John S. Wood—Direct

agreements were carried out. When I dictated the letter to Mr. Mann, addressed to Mr. Mooney, I knew that I would soon sever my connection with the Comptroller's office, as an examiner, but didn't know just when.

A copy of the said letter dictated to Mr. Mann and addressed to Russell E. Mooney, is as follows:

"St. Louis, Mo.
May 19, 1930.

Mr. Russell E. Mooney,
National Bank Examiner,
Box 1092, Louisville, Ky.

Dear Mr. Mooney:

In a meeting with the Board of Directors of the National Bank of Kentucky, Louisville, Ky., held on May 16, 1930, a number of agreements were made which are incorporated in my report of examination of said bank begun on April 26, 1930.

I desire to call to your attention the following agreements which you are charged with responsibility of checking out on the dates mentioned and ascertaining if the agreements have been complied with in full.

The directors agreed that on or before September 1, 1930, the following lines will be taken out or charged off in full.

Kentucky Wagon Company	\$1,576,569.67
Murray Rubber Company	1,355,230.51

(As described under large lines report of examination.)

The Board of Directors agreed that if on July 16, 1930, the stock of the Van Camp Packing Company has not been sold and the profit or loss adjustment made in the Profit Account of the bank, the management of the bank will on said date charge the market loss existing on that date to the Profit and Loss Account.

John S. Wood—Cross

President Brown agreed that on or before September 1, 1930, the loans of Lewis C. Humphrey aggregating \$27,734.74 secured by stock of the Herald-Post would be either collected in full or would be taken up by him.

President Brown and Vice President Fontaine agreed that by reason of a waiver at this time of a charge-off of \$4,500 on the loan of Robert H. Lucas a monthly payment of \$250 will be made.

On the respective dates named above, will you please be present at the bank, if possible, or on the office day immediately preceding said date or immediately thereafter and ascertain from the books of the bank whether there has been a compliance with the agreements above stated. In either event, please advise the Chief National Bank Examiner of this district. Respectfully," and signed by the Chief National Bank Examiner, Eighth Federal Reserve District.

Q. Was that letter delivered to Mr. Mooney—sent to Mr. Mooney?

A. Yes, it was dictated on the 16th and was typed on the 19th and was sent through the mail from St. Louis to Mr. Mooney.

John S. Wood,

recalled for cross-examination by Mr. Crawford, testified:

The reports of examination of the bank, as reflected in the report beginning in 1927 and ending in 1930, correctly represented my conclusions as to the condition of the bank. There was a report of earnings, a report of charge-offs, a report of net amount of undivided profits subject to dividends, a report of declaration and amount of dividends and a net amount still in the undivided profits after that dividend, required of the officers of the bank. There was also a semi-annual statement of earnings made by the Cashier.

Arthur H. Almstedt—Direct

I, personally, made four reports of examinations. It was part of the duties of myself, as examiner, or the examiner who made the report, which I later saw, to examine the correctness of the dividend statements which included the items referred to. The examiner was required to answer a questionnaire contained in the report for the information of the Comptroller.

The bank declared a quarterly dividend of \$160,000.00 for every year beginning October 1, 1927 and continuing until the last time I was in the bank. Either my assistants or myself, in making such examination, examined the reports made by the Cashier to the Comptroller concerning the earnings and dividends, and after that examination came to the conclusion that the dividends were correct. I accepted the conclusion that the dividends of July 1, 1927, October 1, 1927, January 1, 1928, April 1, 1928, July 1, 1928, October 1, 1928, January 1, 1929, April 1, 1929, July 1, 1929, October 1, 1929, January 1, 1930 and April 1, 1930 were correct. That was one of the important things the examiners were to examine in making their reports for the information of the Comptroller.

Arthur H. Almstedt,

called for plaintiff, testified:

I was a member of the Louisville Stock Exchange. It has been out of existence for three years.

Witness produced from the records application filed by Banco Kentucky Company over the signatures of its president, James B. Brown, and its secretary, W. T. Zur-Schmiede, for listing of its stock. This application was introduced as Exhibit 71. The exhibit attached to the application was introduced as Exhibit 71-1.

The minutes of the Louisville Stock Exchange show that on October 4, 1929, at a meeting of the Board of Governors,

John C. Wickliffe, Jr.—Cross

the application to list Banco having been approved by the Listing Committee, it was moved and seconded that Banco stock be listed for trading on the Louisville Stock Exchange.

At this point it was stipulated between the parties that the National Bank of Kentucky was one of the two registrars of Trustees' Participation Certificates and was a registrar of Banco Kentucky Company stock, and that the Louisville Trust Company was the transfer agent of both the Trustees' Participation Certificates and shares of stock of Banco Kentucky Company; that as registrar of the Trustees' Participation Certificates and the stock of Banco Kentucky Company, National Bank of Kentucky had in its books and records a complete record of the names of the Trustees' Participation Certificate holders and the original holders of the stock of Banco Kentucky Company.

Plaintiff produced in open court at this point all the original subscriptions to the stock of the Banco Kentucky Company, signed by the original subscribers—approximately 2400 or 2500. It was agreed to pick out three or four for the record, which would stand as examples of the balance. The subscription of William S. Speed was offered as Exhibit 153, and it was agreed that all other subscriptions were alike except for signatures. Plaintiff also introduced as Exhibits 153-1 and 153-2 subscriptions to Banco stock signed by John C. Wickliffe Jr. and subscription signed by Herbert Tashgian admitted as Exhibit 154.

John C. Wickliffe, Jr.,

called for plaintiff as on cross examination, testified:

I am a lawyer and I am the receiver of the Louisville Trust Company for the purpose of collecting the double legal liability of the stockholders of the old Louisville Trust Company.

John C. Wickliffe, Jr.—Cross

Witness identified a copy of a bill which he filed in his official capacity and which he swore was true. That bill was offered in evidence and objection on behalf of the defendants was sustained as to all other than the witness. The bill was then admitted as Exhibit 155.

The bill was prepared by the attorneys for the old Receiver of the Louisville Trust Company. Judge Lafon Allen, who was then on the bench and who is now an attorney for the defendants in this case, permitted the Fidelity & Columbia Trust Company to resign and appointed me as receiver merely for the purpose of collecting the double legal liability. The receivership had been discharged as to all other purposes and the Louisville Trust Company was then in operation under its reorganization at the time I was appointed.

The day I was appointed was the last day upon which that suit could possibly have been filed in order to come within the statute of limitations against the stockholders proceeded against in that suit. They were the transferor stockholders, or stockholders who held stock but transferred it and did not hold it at the time the bank closed. The suit, petition and everything was prepared by the former receiver and I filed it the day I was appointed but I did not have anything to do with its preparation. The suit was never fought out on its merits. Judge Allen transferred it to Judge Marshall and Judge Marshall upon consideration dismissed it.

I swore to the action as being true according to my best belief on September 10, 1931. I never prepared it and I don't know anything about it. I filed it for the purpose of doing my duty as receiver in order to preclude anybody from saying the statute had run against the suit if there was any merit in it. I knew that I was suing the former stockholders of the Banco Kentucky Company on the ground

John C. Wickliffe, Jr.—Cross

that they were in effect stockholders of the Louisville Trust Company and I knew that I was suing the persons who had turned in their Trustees' Certificates in exchange for Banco stock on the ground that they were liable for their proportionate share of the assessment.

If persons were holders of trustees' certificates—if they were former holders within two years—any former holder within two years can be sued within two years under the Kentucky statutes and that was all I was doing.

Objection as to this defendant's testimony as to all defendants, except the witness, was sustained.

“Q. Did you know that you alleged here that: ‘Plaintiff states that said BancoKentucky Company was organized for the purpose of acquiring and it did acquire more than one-half of the entire capital stock of The Louisville Trust Company, and that such acquisition of more than one-half of the capital stock of The Louisville Trust Company by The BancoKentucky Company was in direct violation of the statutes of the Commonwealth of Kentucky, and that those of the defendants herein named who exchanged Trustees' Participation Certificate-shares for shares of the capital stock of The BancoKentucky Company, as hereinbefore set out, were parties to and cooperated and participated in such illegal acquisition by said BancoKentucky Company of said stock, and that said defendants still remain subject and now are subject to the maximum liability as stockholders of The Louisville Trust Company, to the same extent, measured by their beneficial ownership of Louisville Trust Company stock as hereinbefore set out, as if they had not respectively assigned their Trustees' Participation Certificates to The BancoKentucky Company in exchange for shares of its capital stock but had continued to retain ownership of their respective Trustees' Participation Certificates.’

John C. Wickliffe, Jr.—Cross

A. I didn't know any allegations of that character were in there; I signed it as a matter—as an officer of the Court, under instructions. Judge Allen saw it and authorized it.

Q. When did you first read the bill?

A. I don't recall that I ever read it—there is no question about it, I read it afterwards when I was studying the law and attempting to show the Court the suit was without foundation in law, which was done.

A. That is, you as Receiver, the man who brought the suit, and with the duty of collecting this assessment, were trying to show the Court that it was without foundation?

A. My dear sir, I want to say this—

Mr. Marx: That is all."

I first acquired personal knowledge of the fact that the paragraph which you read was in the petition when it was read to me in the court room.

The petition was prepared by a half dozen lawyers in the Inter-Southern Building. I do not remember who they were and could not name one of them. Some of it may have come from Bruce & Bullitt's office. It was such a hectic thing and had to be done in a hurry in order to get it in. To be frank, it was a joke. Judge Allen held his hearing in chambers in the afternoon. The receivership was discharged and I talked with him awhile myself. Finally, the appointment was made and I filed it. It was a typewritten petition and I had it copied for the benefit of the Bar. I cannot name a single lawyer that assisted in preparing it. Judge Allen insisted that I file the suit and I obeyed the court. I work under the orders of the court as its receiver.

Exhibit 153-1 bears my signature and the notation "Louisville Trust Company" is in my handwriting. Exhibit 153-2 also bears my signature with the notation in my handwriting "Louisville Trust Company." It is a subscription to the plan of reorganization, each of them for

John C. Wickliffe, Jr.—Cross

100 shares of Banco at \$25.00 per share, for which I agreed to pay the sum stated when the plan became effective. At the time I signed this, I had never seen anything with reference to the plan and I don't know anything about it except that I was subscribing for 200 shares of Banco to be paid for at \$25.00 a share as an A No. 1 business investment.

I signed the subscription at 421 West Market Street. I went over there for that purpose and signed it. I don't remember the individual I talked to. I knew when I signed it that I was subscribing in accordance with the plan. I went in and bought what I thought was a good stock and I paid \$25.00 a share cash for it. I executed a note to the Louisville Trust Company which I later took up by my check in cash. It was the bank's money that went into Banco when I made this subscription but I had the cash and paid for it shortly afterwards retiring the note.

At this point plaintiff offered Exhibit 155 as against all stockholders who were named therein. The court overruled the plaintiff's motion and admitted the exhibit only as affecting the claim of the defendant, Wickliffe.

The petition was subscribed and sworn to on September 10, 1931, and was filed on the same date.

Plaintiff then offered in evidence certified copy of order made by Judge Lafon Allen in the case of *Commonwealth of Kentucky on relation of O. S. Denny v. Louisville Trust Company*, Jefferson Circuit Court, No. 205178. Exhibit was admitted in evidence as plaintiff's Exhibit 156.

It was agreed and stipulated between the parties that if Mr. Tom ZurSchmiede were present he would testify as follows with respect to the circular letter of July 19, 1929 (Ex. 24-3).

Q. Will you state how many copies of that letter were printed and what was done with the printed copies of that letter?

Fred B. Stewart—Direct

A. About 5,000 copies were printed and mailed to stockholders, and also distributed to non-stockholders for the purpose of inducing them to buy the stock.

Q. By whom was it printed—at the instance of the Bank of Kentucky or someone else?

A. No, sir; it was at the instance of The National Bank of Kentucky.

Mr. Crawford: What were you reading from?

Mr. Marx: The testimony of Mr. ZurSchmiede.

Mr. Crawford: What case?

Mr. Marx: The directors' liability.

Mr. Crawford: Show that that testimony was given in the suit of *Keyes v. Akers*, later known as *Atherton v. Anderson*.

The Court: You want to stipulate that Mr. ZurSchmiede if present would testify to that. Is there any objection to that? All right, let it go into the record.

Mr. Marx: That letter of July 19th is a letter that has been admitted here, the circular plan, the prospectus letter.

Fred B. Stewart,

called for plaintiff, testified:

I am employed by the Receiver of the National Bank of Kentucky. At the time BancoKentucky Company was organized in July of 1929, I was employed by the National Bank of Kentucky in the capacity of clerk in the Credit Department. That department assembled financial statements from various borrowers and tabulated them to determine the credit responsibility of the borrowers from the bank. A large number of loans were made to persons in order to enable them to purchase BancoKentucky stock.

Q. Tell the court what credit investigation was made to determine the credit responsibility of subscribers to Banco-

Fred B. Stewart—Direct

—Kentucky Company stock who borrowed money from National Bank of Kentucky giving their stock as collateral security.

(Defendants' objection was sustained by the court and the answer taken as an avowal.)

A. No investigation was made.

Q. Was there a campaign, so to speak, made by the officers of the National Bank of Kentucky to secure subscriptions to the stock of the BancoKentucky Company?

(Defendants' objection was sustained and the answer taken as an avowal.)

A. There was.

(The following testimony of Mr. Stewart was in response to questions objected to by the defendants which were sustained by the court and which was introduced as an avowal.) I was present on numerous occasions when conversations were held between persons who were asked by vice-presidents and officers of National Bank of Kentucky to buy BancoKentucky stock. I recall, in particular, Mr. Hayes, Mr. Ormsby, Mr. Jones and Mr. Angermeier. There were numerous instances where persons who were asked to subscribe for stock stated that they had no funds with which to make a subscription. On such occasions the officers of the bank would tell these persons that they did not need any money, that the bank would make a loan and put the stock up as collateral. In many cases the bank advanced the full amount of the subscription price of the stock in order to finance subscriptions to BancoKentucky. Later, when the stock declined in value, no additional collateral was asked for in connection with a deficiency on Banco loans. A number of officers remarked that inasmuch as they solicited the customer or borrower to buy the stock, they were not going to bother him to put up any more collateral.

Fred B. Stewart—Direct

The general practice of the bank with respect to requiring margin on other collateral than Banco Kentucky was fixed. They always required margin on all collateral loans with the exception of Banco. The margin varied from 20% up or, to put it another way, from 80% down.

(There was no cross-examination.)

At this point the plaintiff rested.

*Defendants' Request and Plaintiff's Response***DEFENDANTS' REQUEST OF PLAINTIFF FOR THE
ADMISSION OF FACTS AND THE GENUINENESS
OF DOCUMENTS UNDER RULE 36 OF THE RULES
OF CIVIL PROCEDURE FOR UNITED STATES
DISTRICT COURTS AND PLAINTIFF'S RESPONSE**

Defendants' request for admissions contained thirty-eight separate paragraphs which, with plaintiff's response to each, are as follows:

1. That the statements contained in the answers of the several defendants as to the manner in which they acquired the shares of stock in BancoKentucky Company, whether by exchange for Trustees' Participation Certificates, or by subscription, or by purchase in the open market, and which they held at the time of the closing, are true.

Admitted that, insofar as the answers of the several defendants agree with plaintiff's Exhibit No. 148 "SUMMARY OF INFORMATION RELATING TO HOLDINGS OF STOCK OF BANCOKENTUCKY COMPANY BY ALL STOCKHOLDERS ON NOVEMBER 17, 1930," the same are true, but insofar as the answers differ from said schedule they are denied.

2. That the amount of shares of each class referred to in No. 1, stated in the answer of each defendant, is the amount said defendant owned.

Admitted as under Paragraph 1 above.

3. That all transfers of Trustees' Participation Certificates made by the defendants, who have answered in this case, were out and out transfers of their Trustees' Participation Certificates to the BancoKentucky Company and were made more than sixty days before the closing of the National Bank of Kentucky and the BancoKentucky Company became the true owner thereof at the time of said transfers.

Denied.

Defendants' Request and Plaintiff's Response

4. That from and after the date of the transfers of Trustees' Participation Certificates to the BancoKentucky Company, it became the true, beneficial and only owner thereof.

Denied.

5. That at the time of the transfer of each and all of the Trustees' Participation Certificates to BancoKentucky Company the National Bank of Kentucky was solvent.

Not Admitted.

6. That at the time of the transfer of the Trustees' Participation Certificates by the defendants in this cause and at all times thereafter and up to and including November 15, 1930, the National Bank of Kentucky was solvent.

Not admitted.

7. That defendants' Exhibit No. 1, covering the Petition, the Answer, the Testimony, the Opinion, and the Judgment in the case of *Venhoff & Hillen v. Paul C. Keyes, Receiver*, filed in the United States District Court for the Western District of Kentucky, is correct and that there was no appeal taken in said cause and that said judgment is still in force and effect.

Admitted that defendants' Exhibit No. 1 sets forth a correct copy of the petition, the answer, the testimony, the opinion and the order of dismissal in the case of *Venhoff & Hillen v. Paul C. Keyes, Receiver*, that there was no appeal from the order of dismissal. Plaintiff's objection to the admission of the record in said case was sustained. (Defendants offered the record in said cause as an avowal and the same was marked for identification Defendants' Exhibit No. 3.)

8. That at the time the Trustees' Participation Certificates were transferred to BancoKentucky Company for its stock, each holder thereof believed that the National Bank of Kentucky was solvent.

Not admitted.

Defendants' Request and Plaintiff's Response

9. That Exhibit No. 2 contains a correct copy of the published statements of the National Bank of Kentucky as of

March 27, 1929
 June 29, 1929
 Oct. 4, 1929
 Dec. 31, 1929
 March 27, 1930
 June 30, 1930 and
 Sept. 4, 1930

and said Exhibit is an exact copy of "Exhibit No. P-171" filed by the Plaintiff-Receiver, or his predecessor, in action No. 649 in the United States District Court, for the Western District of Kentucky.

Admitted that Exhibit No. 2, a copy of Exhibit No. P-171 in the case of *Anderson v. Atherton*, the record in which case is Defendants' Exhibit No. 1 in this cause, sets forth a correct copy of the published statements of the National Bank of Kentucky as of the dates named. (See also Defendants' Exhibit No. 25.)

10. That the published statements set forth in Exhibit No. 2 reflect the actual condition of the National Bank of Kentucky.

Not admitted.

11. That no one of the defendants, who have answered herein, knew of any inaccuracies or untruthfulness in the published statements referred to in No. 9, if there were any such.

Not admitted.

12. That on each of the following dates the National Bank of Kentucky declared a quarterly dividend of four per cent and paid same on the dates shown below, the dividend amounting in each instance to \$160,000:

Defendants' Request and Plaintiff's Response

DECLARED	PAID	AMOUNT
June 10, 1927	July 1, 1927	\$160,000.00
September 2, 1927	October 1, 1927	160,000.00
December 9, 1927	January 3, 1928	160,000.00
March 16, 1928	April 2, 1928	160,000.00
June 15, 1928	July 2, 1928	160,000.00
September 14, 1928	October 1, 1928	160,000.00
December 14, 1928	January 2, 1929	160,000.00
March 8, 1929	April 1, 1929	160,000.00
June 14, 1929	July 1, 1929	160,000.00
July 26, 1929	October 1, 1929	160,000.00
December 12, 1929	January 1, 1930	160,000.00
March 14, 1930	April 1, 1930	160,000.00
June 20, 1930	July 1, 1930	160,000.00
September 17, 1930	October 1, 1930	160,000.00

Admitted that the Bank declared and paid the quarterly dividends above set forth except the dividend referred to as having been declared December 12, 1929, was actually declared December 13, 1929, and paid January 2, 1930. The dividend described as having been declared September 17, 1930, was actually declared September 19, 1930.

13. That following the declaration of each dividend, pursuant to the requirements of the United States Revised Statutes, the Cashier of the National Bank of Kentucky, under oath, filled in a form provided by the Comptroller of the Currency, showing the net earnings available for dividend in excess of the capital and surplus of the bank and after deducting known losses and statutory bad debts, and in each instance said reports showed that there were sufficient net earnings available for dividends to leave the capital of \$4,000,000 and surplus of \$2,000,000 intact.

Admitted that, following the declaration of each dividend, the cashier of the Bank filled in a form provided by the Comptroller of the Currency.

Defendants' Request and Plaintiff's Response

14. That each of said reports were received by the Comptroller of the Currency.

Admitted that said forms of report were sent to and received by the Comptroller of the Currency.

15. That the National Bank of Kentucky had been examined, prior to 1927, at least twice every year by a National Bank Examiner, acting under the Comptroller of the Currency, and was examined beginning April 23, 1927, and thereafter examined beginning October 14, 1927, March 9, 1928, October 13, 1928, May 25, 1929, December 30, 1929, April 26, 1930, and September 17, 1930.

Admitted.

16. That each of said reports was on forms prepared by the Comptroller of the Currency and contained a questionnaire as to dividends and surplus, requiring the Examiner to give the date of the declaration of the last dividend, the amount of same, and to state whether the last report of earnings and dividend was correct, and in each instance the Examiner reported in each of the above reports that all earnings and dividends were correct. A copy of each of said reports was sent to the Comptroller by the Examiner directly upon its completion and was received by him.

Admitted that reports of the examinations referred to were exhibited to defendants and admitted to be authentic and that said reports were sent to and received by the Comptroller of the Currency.

17. That no one of said dividends was criticized by the Comptroller of the Currency after the receipt of the notification from the Cashier, or after the receipt of the National Bank Examiner's report following the declaration of said dividend.

Not admitted.

Defendants' Request and Plaintiff's Response.

18. That the Receiver of the National Bank of Kentucky brought action No. 649 in the District Court of the United States, for the Western District of Kentucky, against all the directors of the National Bank of Kentucky, in which he claimed that there had been an unlawful payment of each of the dividends referred to in No. 12 above.

Admitted that a petition was filed in said action No. 649 against the Directors of said Bank but asserted that said petition was available in the files of the Court and that it speaks for itself.

19. That issue was joined upon this question and, after a full hearing of evidence thereon, the Master in said cause rendered a report holding that each of said dividends had been lawfully declared.

Admitted that a hearing was had in said cause and a report filed by the Master but the conclusions with respect to said hearing and said report are questions of law which were not admitted.

20. That thereafter a hearing was had before the District Court of the United States, sitting in the Western District of Kentucky, on exceptions filed by the Receiver and an opinion was rendered, followed by a judgment dismissing the Bill as to any claim of illegality of any dividends. The pertinent portion of said opinion is as follows:

"The Master disallowed this claim in its entirety, finding that the evidence failed to show any facts indicating any statutory violation of any of the directors or any negligence on their part in connection with these dividends. The Master discussed and analyzed, at great length and in much detail, numerous debts which the plaintiff claims should have been charged off as statutory bad debts, and after painstaking and thorough consideration of such debts and of the other relevant facts and circumstances the Master found that the evidence did not sustain this claim of the plain-

Defendants' Request and Plaintiff's Response

tiff. To recite or review these details would unduly prolong this opinion and would serve no useful purpose. It is sufficient to say that the findings of the Master are convincingly supported by the record. It is entirely clear, and I find, that the witnesses on whom the plaintiff relied in this connection had no personal knowledge of the facts concerning which they assumed to testify. There is no competent evidence sufficient to sustain the burden resting on the plaintiff of proving that any of these dividends were paid out of capital of the bank or were not paid out of its net profits after deducting therefrom its losses and bad debts, including all debts on which interest was past due and unpaid for a period of six months and which were not well secured and all debts in process of collection. It appearing that the findings of the Master are supported by the record, such findings are affirmed, and no recovery against these directors by reason of the declaration or payment of these dividends will be awarded."

That there was no appeal by the Receiver of the National Bank of Kentucky from said judgment. Said judgment was entered July 8, 1935, and Motion for a Rehearing was overruled more than two years ago.

Conclusions to be drawn from the proceedings had in said cause No. 649 are matters of law which were not admitted.

21. In the minute books of the National Bank of Kentucky, purporting to record the minutes of December 16, 1927 (p. 304), June 1, 1928 (p. 318), June 8, 1928 (p. 319), June 22, 1928 (p. 320), August 31, 1928 (p. 325), December 7, 1928 (p. 352), there is recited therein that certain letters from the Comptroller of the Currency were read to the directors present. None of these letters were read to the directors present.

Denied.

Defendants' Request and Plaintiff's Response

22. In the suit of *Keyes, Receiver, v. Akers*, being Equity Action No. 649, in the District Court for the Western District of Kentucky, the plaintiff in that suit, who was succeeded by the plaintiff in this suit as receiver of the National Bank of Kentucky, asserted the genuineness of the minutes, and the defendants in said suit, the directors of the National Bank of Kentucky, some of them being defendants in this suit, denied the genuineness of said minutes, and upon which issue was joined insofar as the verity of said minutes was concerned, and on which issue proof was taken. With the whole record before him, after both sides had announced through the taking of testimony, the Master found:

"I don't think that any of these letters reached the board of directors, notwithstanding the recitation in the minutes to that effect. The minute book now indicates that there were six such letters presented and read to the board, namely, December 16, 1927, p. 304, of the minute book; June 1, 1928, p. 318 of the minute book; June 8, 1928, p. 319 of the minute book; June 22, 1928, p. 320 of the minute book; August 31, 1928, p. 325 of the minute book, and December 7, 1928, p. 332 of the minute book. It is satisfactorily established that the minutes, after being read to the board, were fraudulently altered so as to show the presentation and consideration of these letters. The concealment of these letters from the board and the fact that such questionable, not to say dangerous, means were resorted to to accomplish it, demonstrates the character of the collusion with which the directors were unknowingly surrounded."

Paragraph 22 contains conclusions of law and is not admitted.

23. The case mentioned in the next above numbered paragraph came on to be heard before the sitting judge for the

Defendants' Request and Plaintiff's Response

Western District of Kentucky upon exceptions to the Master's report, and after a full and complete hearing, the Judge of said court, in overruling the exceptions of the plaintiff so filed in said action, said:

"The Special Master found . . . 'Further, he fraudulently caused to be concealed from the nonofficer directors reports of bank examiners, letters from the Comptroller of Currency, and other information which would have disclosed the character of such loans as loans to Wakefield & Company in excess of the statutory limit. That such directors did not have such information, had no reason to doubt the propriety of such loans, and, in approving them, relied on the officers of the bank to whom they had entrusted the administration of the details of its affairs; that such directors were not guilty of negligence in connection with such loans, and that, although the defendant officers were liable for the loss resulting from the making of these loans because they knew that such loans should be grouped together as Wakefield & Company loans, and, when so grouped, were in excess of the said statutory limit, yet, the other defendants being without that knowledge, were not so liable, except as hereinafter pointed out. I am satisfied by the record that the findings of the master just mentioned are supported by substantial evidence and that the court would not be warranted in setting such findings aside.'"

Plaintiff refers to the opinions rendered by the Court and the language contained therein.

24. On appeal of the aforesaid action, mentioned in the next above two preceding numbered paragraphs, to the Circuit Court of Appeals for the Sixth Circuit (86 F. [2d] 518), that Court confirmed and approved both the findings of the Master and the District Court as set forth in the next above two preceding paragraphs on the issue thus

Defendants' Request and Plaintiff's Response

joined, and that said findings of fact are still in full force and effect.

Denied.

25. In action No. 649, *Keyes, Receiver, v. Akers*, in the Western District Court of Kentucky, the plaintiff therein, succeeded by the plaintiff-receiver in this cause, claimed and contended that the criticisms set forth in the National Bank Examiners' reports as of April 23, 1927, October 14, 1927, March 9, 1928, October 13, 1928, May 25, 1929, December 30, 1929, April 26, 1930, and September 17, 1930, were read to the board of directors of the National Bank of Kentucky, and the defendant directors in said cause, some of whom are defendants in this cause, denied that said criticisms were read from said reports to the directors, upon which issue was joined, and after a complete hearing before the Master, on said issue so raised, he made findings of fact as follows:

"It is perfectly apparent that Brown and Jones, without protest from any member of the loan committee, were designedly omitting to read parts of the reports of the Examiners, concealing letters from the Comptroller, fraudulently evading the demands of that office, and continuously misleading the non-officer directors. The covering up which Brown and Jones were guilty of, and their acts of concealment in the presence, and with the acquiescence of the other officers while the board of directors was in session, strongly indicates collusion between these parties, the purpose of which was to enable Brown, without the knowledge of the non-officer directors, to successfully extract funds from the bank in the name of Wakefield & Company, or its employees."

Paragraph 25 states contentions and conclusions of law and is not admitted.

Defendants' Request and Plaintiff's Response

26. The case mentioned in the next above numbered paragraph came on to be heard on exceptions filed to the report of the Master by the plaintiff therein, and the sitting district judge for the Western District of Kentucky quoted and adopted the findings of the Master as above set forth. This finding of fact has never been reversed, modified or set aside and is in full force and effect.

Denied.

27. Exhibit No. 4 is the testimony of *Jay Fordyce Wood*, taken in Equity Action No. 649, *Keyes, Receiver, v. Akers et al.*, found recorded in the testimony in said action, Volume 5—Kentucky Wagon Company, pages 2001-2070, copy of which testimony is in the possession of the plaintiff. Issue upon which such testimony so offered was as to the authenticity of the minutes of the board of directors of the National Bank of Kentucky as of the dates mentioned in paragraph No. 21, insofar as said minutes purported to show that the letters of the Comptroller of the Currency addressed to the Bank of Kentucky or its directors had been read to the board of directors at several meetings, which letters of the Comptroller are among the letters sought to be admitted herein by the plaintiff. Since giving said testimony the witness, Jay Fordyce Wood, has died.

Admitted that said Exhibit No. 4 is a correct transcript of the testimony of Jay Fordyce Wood taken in said Equity Action No. 649 and that said witness has died. The remainder of said paragraph denied.

28. Exhibit No. 5 is a statement of the Banco Kentucky Company as of December 12, 1929.

Exhibit No. 5 not admitted for want of adequate information with reference thereto.

29. Exhibit No. 6 is a statement of the Banco Kentucky Company as at December 31, 1929.

Exhibit No. 6 not admitted for want of adequate information with reference thereto.

Defendants' Request and Plaintiff's Response

30. Exhibit No. 7 is a statement of the BancoKentucky Company as at September 18, 1930.

Exhibit No. 7 is not admitted for want of adequate information with reference thereto.

31. Exhibit No. 8 is a consolidated statement of the National Bank of Kentucky and Louisville Trust Company as of June 29, 1929.

Plaintiff assumes Exhibit No. 8, not attached to defendants' request, is the same as Exhibit No. 26-12, paragraph 48, of plaintiffs' request for admissions.

33. That the BancoKentucky Company stock was listed on the Chicago Stock Exchange and the following Exhibit No. 9, which is copied in the record in *Keyes v. Akers*, hereinabove referred to, in BancoKentucky volume at pages 224 to 239, inclusive, a copy of which is in your possession, correctly shows the amount of sales and the daily price thereof of Banco stock as reflected by sales in Chicago.

Admitted.

34. That the BancoKentucky Company stock was listed on the Louisville Stock Exchange and the sales of BancoKentucky stock and the daily quotations are contained in Exhibit No. 10, filed herewith, a copy of which you already have.

Admitted.

35. That directly after the obtention of the charter of the BancoKentucky Company, July 16th, 1929, 49 directors were elected to its Board. 19 of these directors were at all times directors of the National Bank of Kentucky. 15 of the directors were never directors of the National Bank of Kentucky. 15 of the directors were at all times directors in the Louisville Trust Company. These same 15 directors were directors of the National Bank of Kentucky between June 3rd, 1927, and January 14th, 1930, and not directors of the Bank of Kentucky at any other time. Between July

Defendants' Request and Plaintiff's Response

19th, 1929, and January 14th, 1930, 34 of the directors of BancoKentucky were also directors of the National Bank of Kentucky.

Admitted.

36. That Exhibit No. 11 is a correct statement of the cash receipts and disbursements of BancoKentucky Company from September 13th, 1929, to November 22nd, 1929.

Admitted.

37. That BancoKentucky Company was incorporated under the general corporation laws of the State of Delaware. That said law provides and then did provide as the Kentucky Law provides, that the certificate of incorporation shall state whether or not private property of the stockholders shall be subject to the corporate debts. That in at least 99 per cent of all certificates of incorporation filed under the general corporation law of the State of Delaware the certificate states that the private property of the stockholders shall not be subject to the corporate debts in the same way as did the BancoKentucky Company certificate of incorporation. That said provision is also the usual and customary provision to place in articles of incorporation filed under the general corporation law of the State of Kentucky.

Reference may be made to the laws of Delaware and Kentucky and any authorized publications of such laws with reference to the statement of laws contained in Paragraph 37. The remainder of said paragraph is denied.

38. That Exhibit No. 12 is a correct copy of the opinion in action No. 205,178 in the Jefferson Circuit Court, wherein Anne Bullitt Brewer is a party and in which suit the answer of The Louisville Trust Company is especially referred to in the request for admissions of plaintiff. That following the delivery of said opinion the defendant, The Louisville Trust Company, settled and compromised and

T. E. Burkholder—Direct

paid to Anne Bullitt Brewer for the estate therein involved the amount of money that her fiduciary was willing to accept in compromise.

Admitted.

DEFENDANTS' EVIDENCE

T. E. Burkholder

called in his own behalf, examined by Mr. Van Winkle, testified as follows:

My name is T. E. Burkholder. I live at 1846 Rutherford Avenue, Louisville. I am not actively engaged in business at present and spend most of my time in California.

I was a holder of Banco Kentucky Company stock at the time that institution closed. I purchased 400 shares through Mr. ZurSchmiede, who then had an office in the Bank of Kentucky, as I remember, the National Bank of Kentucky. I never owned any Trustees' Participation Certificates or any stock in the Bank of Kentucky or Louisville Trust Company.

I retired from business on account of my health in 1928, and have since probably spent half of my time in California. I would come back and spend some time with my sisters and mother and father and the balance of time in the West.

With respect to my knowledge of the financial condition of the Bank of Kentucky—my information of the Bank of Kentucky was that it was a first-class, high-grade financial institution, so much so that I recommended it to my mother and sisters so that in my family, my mother and sisters, we had four accounts—certainly three, but I think it was four. Some of those accounts are there yet. On October 2, 1929, I hadn't the slightest idea that the Bank of Kentucky was either insolvent or in financial difficulties.

T. E. Burkholder—Direct

Regarding my subscription for Banco stock—I have a friend here in town whom I regard as particularly familiar—particularly well informed on business conditions in Louisville. As I recall, I just returned from out of town and I called his office one day and he mentioned it and asked if I had subscribed for it. I told him I had not heard of it and didn't know what it was. I sat down and talked to him about it. He was under the impression—he recommended to me that he thought it would be a very good thing to invest in and would make a good, safe investment. It was on his recommendation, without going into it—on his strong recommendation that I subscribed for it.

The paper you show me is my signed subscription for stock of the BancoKentucky Company. It is dated October 2, 1929.

Said subscription was received in evidence and marked for identification "Defendants' Exhibit Burkholder No. 1."

When I subscribed to BancoKentucky Company stock, my understanding was that it was to be a general investment and financial business, underwriting business, not closely allied to any other one concern, but to have a general investment business.

At the time I bought this stock, I did not know that BancoKentucky Company owned or expected to own any particular amount of the Bank of Kentucky stock. As a matter of fact, I had no idea that they had or intended to have any other bank stock. The information that I had on it was through my friend who had recommended it to me, but I don't recall of having seen any plan of organization or reorganization. In the light of having signed the application for it there, I certainly must have read it as "Plan of Organization" rather than "Plan of Reorganization," be-

T. E. Burkholder—Cross

cause at no time had I any idea there was to be anything reorganized.

When I subscribed and received delivery of my stock, I did not intend to make a subscription to BancoKentucky Company stock with a view of avoiding or evading any liability on account of BancoKentucky Company owning or holding any National Bank of Kentucky stock.

I paid \$25.00 a share for my stock in cash.

At the time I subscribed I had no understanding that BancoKentucky Company was going to engage in a banking business. I don't know where I got the impression, but I had the impression, from what he said when I talked to Mr. Gaylord, that it was to be largely, or to quite some extent, in the utility business, financing utilities, and that that would be quite an item of their line.

I never saw any such letter of July 19th and had no understanding at any time that there was any reorganization about it.

On cross-examination by Mr. Marx, Mr. Burkholder testified as follows:

These 400 shares of Banco cost \$10,000. I did not commit myself to sign a document for \$10,000 without reading it. In a general way, I would certainly want to know something about what I was reading.

My subscription reads in part—"In accordance with the privilege given me under said Plan of Reorganization, I hereby subscribe for 400 additional"—the word "additional" is crossed out—"shares of The BancoKentucky Company, at Twenty-five (\$25.00) Dollars per share, and agree to pay the purchase price thereof on call of the Company following the date said Plan becomes effective." I must have read the word "Reorganization" if I signed it there.

T. E. Burkholder—Cross

Before I retired, I was managing the agency for the Burroughs Adding Machine Company in Wheeling, West Virginia, for about seven years before I retired in 1928.

I noticed that this blue paper which I signed is perforated at the top. It is the same as the bottom part of Plf's Ex. 24-4.

The friend who gave me my information about Banco Company was Mr. Paul Gaylord, Anchorage, Kentucky. I had just one conversation with him before purchasing the stock. That was on Breckenridge near Third. He was at that time local agent for the Burroughs Adding Machine Company. I don't remember any one else was present. The conversation was the same day I signed the subscription blank.

I went to the National Bank of Kentucky, Fifth and Main, to sign the subscription where I saw Mr. ZurSchmiede. I can't recall verbatim what I said to Mr. ZurSchmiede. I think probably I just went in and told him Mr. Gaylord had sent me down there and suggested that the BancoKentucky Company would offer a good investment and I asked if he had any shares available and that I would want to subscribe—buy some of them. I did not know Mr. ZurSchmiede and had never met him before.

I went to see him because Mr. Gaylord told me to see Mr. ZurSchmiede and to tell him he sent me down there. Mr. Gaylord knew Mr. ZurSchmiede. Mr. Gaylord had subscribed for BancoKentucky Company stock.

I suppose the National Bank of Kentucky was commonly referred to in Louisville as the Bank of Kentucky—I don't know—I have not spent so very much time here in Louisville. When I went in to see Mr. ZurSchmiede, I knew that the company whose stock I was subscribing for was called BancoKentucky Company. I don't recall that Mr. ZurSchmiede said anything about the company very much in

T. E. Burkholder—Cross

detail. I think my purchase was made largely on the recommendation of Mr. Gaylord, whose opinion on those things I respected and had confidence in. In view of the fact that he had invested his own money in it and seemed to be enthusiastic over it, I didn't investigate it as thoroughly as if I was dealing with a stranger. Mr. ZurSchmiede must have said something about the company, but I don't recall it. You see, it has been over ten years ago. I don't think Mr. ZurSchmiede said anything along the line that they were going to own the majority of the stock of the National Bank of Kentucky.

I regarded the National Bank of Kentucky as financially sound and regarded by business men as a high-grade bank. I don't know that I thought of it much one way or the other from the standpoint of a good investment.

73—Naturally, you knew from the name that it had some connection with the National Bank of Kentucky?

A.—No, I wouldn't know that. There was a good many institutions being organized.

74—You knew that a National Bank—you went to the National Bank of Kentucky to buy the stock, didn't you?

A.—Yes.

75—You talked to the Cashier of the National Bank of Kentucky?

A.—I talked to Mr. ZurSchmiede; I don't know what his position was.

76—You knew that a National Bank is not allowed to sell common stocks?

A.—Yes, I knew that.

77—So, the very fact that the National Bank of Kentucky were selling this stock indicated to you, both the name, where you went to buy it and the person to whom you talked, all indicated to you that there was some connection between the National Bank of Kentucky and the Banco-Kentucky Company?

T. E. Burkholder—Cross

A.—I don't know just what you mean by the connection. I understood the same people who officered or were interested in the National Bank of Kentucky were interested in the BancoKentucky, but I didn't understand there was any financial hook-up between the two.

78—Of course, you knew national bank stock was assessable and subject to double liability?

A.—Yes.

79—You knew or understood that this stock in the BancoKentucky Company was not assessable, didn't you?

A.—That the BancoKentucky Company stock was not assessable?

80—Yes.

A.—Yes.

81—Now, you say you knew the same people were going to own the BancoKentucky Company as owned the National Bank of Kentucky?

A.—I didn't say own it; I said the same people interested in the National Bank of Kentucky were interested in organizing the BancoKentucky Company.

82—Interested financially?

A.—I understood so.

83—Now, Mr. Burkholder, didn't you know that the principal investment at that time of the BancoKentucky Company was to be bank stock?

A.—I can't say that I did, sir.

84—You won't say you didn't though?

A.—As I said awhile ago, my understanding of the BancoKentucky Company was that they were to do a general financial business.

85—You said in financial institutions?

A.—I don't know about financial institutions.

Mr. Van Winkle: The witness didn't say that.

A.—To do a general financial business and underwriting.

T. E. Burkholder—Cross

86—You understood it was going to invest in bank stocks, didn't you?

A.—I don't know that I understood that. I don't think there was anything definite said about it at that time. My thought was they would buy and sell bonds and underwrite business. That is just about the sum of my impression at the time. My impression, as I say, was that bank stocks were not to be an appreciable part of their investments, or that they were to be particularly interested in any one bank, but, as I say, to do a general underwriting business and buy bonds.

87—Well, you said in your answer it was not your understanding that bank stocks were to be such an appreciable part of the business, but you did understand that among other things they were going to own bank stock?

A.—I would like to answer that, but I don't think I can say definitely and be fair to yourself or myself either, that I did understand they were going to own bank stock.

88—You don't want the Judge to understand that it was your thought that this company was not going to own any bank stocks?

A.—No, the chances are that I had some inkling there might be some investments in bank stocks.

89—Including the National Bank of Kentucky and Louisville Trust Company?

A.—No, I could not say I understood that part.

90—Didn't you understand they were going to have a chain of banks?

A.—No, I can't say that I understood that part either.

I can't remember how long prior to October 2, 1929, I had been in Kentucky because at that time I was making numbers of trips West and I doubt very much if I have any data that will enable me to refresh my recollection on that point. I will just say this: maybe this will clear it up:

T. E. Burkholder—Cross

The first thing I heard of the Banco Kentucky Company being organized or anything in connection with it was when I went into Mr. Gaylord's office and he asked me about it and talked about it there, and I went from there that same day down to—subscribed for 400 shares of it.

I don't recall of having read anything in the papers about it. When I am home I read the Courier-Journal and Times. My home is right here in the city. I am pretty sure that I had come back from California but I can't recall specifically or state definitely how long I had been here.

I did business with the First National Bank and had a deposit account there. When I was in the city I took my deposit accounts down there. Yes, that will give it to me; I can look it up and find out the dates I may have made deposits or drawn checks. I can't recall how long I was in the city before October 2, 1929, and how long I remained here afterwards.

Occasionally I read the Herald-Post. My permanent residence was here at 1846 Rutherford Avenue. The paper was delivered there. The family was a regular subscriber, they subscribed for the papers there. In any event, I was here all the month of October, 1929, and until after the first of the year. That would be a little bit long.

I paid my subscription fee promptly because I know he said something about issuing temporary certificates and the certificates not being ready for some little time, and I made some payment on it, and then was under the impression that I would be notified that the permanent certificates would be issued, and they were not, and I went down to see about it, intending at that time to pay all of it. I found out at that time that they had a charge of interest against me for the unpaid part of it—I don't know how much, and I paid \$25 a share and interest for the unpaid part, about \$2 or \$3. It took a day or two after that, because in order

T. E. Burkholder—Cross

to pay it I had to convert some other securities and pay it in cash. I was interested then in when I would be called upon to pay the \$10,000. I understood it was to be cash—it was a matter of a few days. I didn't inquire when the Company would call the purchase price. I just understood that they would notify me when that would be.

I never saw any such letter as Plf's Ex. 24-5. Apparently that has reference to Trustees' Participation shares. I didn't own any. I didn't see Plf's Ex. 24-6, the letter sent telling people that they have to pay before October 1st. I don't think I ever saw anything in connection with Plf's Ex. 24-3, the letter of July 19th. That was before my subscription date. I received dividends from Banco Kentucky Company. I am sure I could not recall whether accompanying them was any statement informing me as to what they held. I am not certain that I was in the city for as much as a week before October 2, 1929, but the probabilities were that I was.

You show me the Herald-Post for Thursday evening, October 26 and call my attention to the front page which says "Two Ohio Banks Taken Over by the Banco Kentucky Company. Resources of Institution are increased to \$215,000,000 by deal" and in the body of the article you call my attention to the fact that it says "the Banco Kentucky Company was formed recently with James M. Brown, President of the National Bank of Kentucky, to take over control of the National Bank of Kentucky and the Louisville Trust Company through an exchange of stock. The exchange of stock was completed last Thursday." I certainly don't recall that.

You show me the Courier-Journal of September 27th, two days later, with the headlines "Two Banks Sold to Banco Kentucky Company." I don't recall seeing that.

You show me the Herald-Post for September 27th with large headlines "Cincinnati Enquirer Lauds Banco Ken-

T. E. Burkholder—Cross

tucky Company Deal and Sees Great Advantage to City" and a second headline "Cincinnati Banks Join Midwest Chain; Brighton and Pearl Market Join Big Unit in Kentucky." I am sorry, I didn't see any of it. I am sorry, I can't tell you how long before that I was in the city.

I kept my stock until the close. I will say I did know after I purchased it that they were interested in banks. I couldn't say when I learned that, but it was after the stock was delivered to me. We were getting dividends. Certainly, I was aware that they were interested in banks; everybody knew it. It was the general opinion later that they were interested in banks.

129—You then learned they owned practically all the stock of the National Bank of Kentucky?

A.—I would say—I would have to acknowledge I did learn that they owned practically all of it, or an appreciable amount of it, let's put it that way.

130—And also the Louisville Trust Company?

A.—I don't remember about the Louisville Trust Company, but my understanding was they were interested in banks in Cincinnati and in the National Bank of Kentucky, and probably others.

131—Cincinnati Banks: You mean the Brighton Bank and the Pearl Market Bank?

A.—I don't know the names of them.

132—You say possibly others: You knew, in other words, that they owned a chain of banks in the Ohio Valley?

A.—Let's not put it that way; I can put it better this way: I had information that they were interested in other banks. How many, I don't know. I don't know that I could tell you the location, at this time.

133—Ashland and Paducah?

A.—Yes, I think I heard of those.

134—Covington?

T. E. Burkholder—Cross

A.—I am not certain.

135—You knew that at the time you were getting your dividends?

A.—That is right.

136—You decided to keep your stock?

A.—Yes.

137—With that knowledge?

A.—With that knowledge, yes. It was probably a mistaken idea that we were without any double liability clause on it.

Mr. Marx: Now, if Your Honor please, that is all I want to ask him. I don't want to stop this gentleman from going to California, but I do want to check, by subpoena, his deposit account and his deposit slips at the First National Bank to ascertain the length of time he was here.

The Court: He says he will get that information as best he can, by consulting with the bank and by talking with the members of his family, to ascertain as best he can, how long he had been here prior to October 2, 1929. He can get that information and give it to his attorney and his attorney will put it in the record. That will answer the purpose.

Mr. Marx: I think it will. Mr. Kasfir has a suggestion to make. If Your Honor please, it appears also that he did not pay his subscription immediately, because he paid interest on a deferred subscription, so we want to know how long he remained here afterwards.

The Court: He will get that information. Mr. Burkholder, get that information and give it to Mr. Van Winkle to put in the record.

The Witness: I might say that that was due to a misunderstanding as to when the certificates would be ready, and I was, as I recall it, waiting for them to notify me that they were ready for delivery.

Mr. Van Winkle: I would suggest that they have the record showing the date of payment. It was on October 8th.

Allen P. Dodd—Direct

The Witness: If I can do anything to clarify it, please let me do it; I want to give you the information as impartially as I know how.

The Court: That is all, Mr. Burkholder.

Allen P. Dodd,

called for defendants, examined by Mr. Crawford, testified as follows:

I am a lawyer, having engaged in the practice of law for thirty-one years, twenty-five years in Louisville, Kentucky. Early in 1927 I was a director in the Louisville Trust Company and a stockholder of that company. In connection with the combination through trusteeing the stock of The National Bank of Kentucky and The Louisville Trust Company, an investigation was made by the Trust Company as to the net worth of The National Bank of Kentucky. A committee was appointed to represent The Louisville Trust Company in ascertaining the net worth of The National Bank of Kentucky. The Louisville Trust Company committee met with the committee for The National Bank of Kentucky and the two committees left the matter of the valuation of both banks to Humphrey-Robinson and Company, which concern had audited the two banks and the Louisville Clearing House for a number of years.

I was connected with the case of *Keyes v. Akers* later known as the Atherton case both as attorney and as a defendant. Question of the Humphrey-Robinson report was brought into that case.

Humphrey-Robinson and Company made a written report to The Louisville Trust Company regarding the value of The National Bank of Kentucky. This report was recorded in the minutes of The Louisville Trust Company board of directors, with the minutes of the adjourned meeting held May 21, 1927. The report is as follows:

Allen P. Dodd—Direct

"Mr. Amgereaau Gray,
Chairman of Committee,
Louisville Trust Company,
Louisville, Kentucky.

Dear Sir:

As per your request, and that of Mr. Charles F. Jones, cashier of The National Bank of Kentucky, we would state that in our last examination of that bank we estimated its net worth to be \$7,189,292.25, at December 31, 1926.

This estimated net worth was arrived at by us after taking the total net worth of the bank per the books, and adding to that figure the estimated appreciation over book values of its assets, and deducting the depreciation from book values on account of estimated losses.

Trusting this is the information desired, we are,

Yours respectfully,

Humphrey-Robinson and Company."

This letter was written before the Trust Company's board agreed to the unification, to-wit on March 17, 1927. Humphrey-Robinson and Company was the Clearing House Examiner for all the banks in Louisville belonging to the Clearing House Association and was one of the highest grade accounting firms in this locality. The Louisville Trust Company board of directors acted upon the information contained in this letter in recommending the consolidation to that company's stockholders. Prior to the approval of this letter by the Trust Company's board of directors I had no knowledge of the details of the assets of The National Bank of Kentucky and had not been connected with that bank in any way.

At that time the capital of The National Bank of Kentucky was \$2,500,000.00 and its surplus \$2,500,000.00. The general basis of the Trust Company's and the Bank's

MICRO CARD 22
TRADE MARK **®**

43

2

2741



63



Allen P. Dodd—Direct

trade was four for one. The net asset value of the bank was approximately four times the net asset value of The Louisville Trust Company. The earnings were likewise approximately four to one. The net earnings of The Louisville Trust Company were approximately \$200,000.00 and the net earnings of The National Bank of Kentucky, as reported to us, were approximately \$800,000.00. The net asset value of The National Bank of Kentucky was \$7,189,292.25 and the net asset value of The Louisville Trust Company was \$1,830,123.82. Humphrey-Robinson and Company also made a report to The National Bank of Kentucky of the net asset value of The Louisville Trust Company. At that time The National Bank of Kentucky did not have enough outstanding capital stock to have the stock trustee on the basis of four to one with The Louisville Trust Company and it was necessary for the bank to increase its capital from \$2,500,000.00 to \$4,000,000.00. This increase was affected by a declaration of a stock dividend, out of surplus and undivided profits, amounting to \$1,500,000.00. It was necessary to secure the consent of the office of the Comptroller of Currency to the declaration of this \$1,500,000.00 stock dividend. Mr. John Stites, President of The Louisville Trust Company made a report to the board of directors after his return from Washington where the whole plan of unification was submitted to the Comptroller's office for his approval. Mr. Stites reported to the board that the Comptroller approved the trust agreement and congratulated The Louisville Trust Company's president for such a splendid connection with such a splendid bank as The National Bank of Kentucky. This testimony was given in the director's case. It was also necessary at that time to obtain the consent of the Federal Reserve Board to the interlocking directorate. Such consent was given and the unification was approved by The Federal Reserve.

Allen P. Dodd—Direct

After the trusteeing of the stock in The National Bank of Kentucky and The Louisville Trust Company I had twenty shares, ten shares of National Bank of Kentucky and ten shares of Louisville Trust Company stock. I owned ten shares of National Bank of Kentucky stock. It was physically in the safety deposit box in The Louisville Trust Company from the time of the unification until the banks closed.

I was one of the trustees under the Trust Agreement. I was and am familiar with the terms of the Trust Agreement. When I deposited these ten qualifying shares of stock I and every other director got a copy of the same receipt. These receipts were filled in for the various directors, and were in the following form: "Louisville, Kentucky, June , 1927. Received of A. J. Carroll, Certificate No. AJ3060 for ten shares of stock of the National Bank of Kentucky, same to be returned to him upon demand," signed "Trustees under agreement dated April 22, 1927, between the stockholders of the National Bank of Kentucky and Louisville Trust Company, by Huston Quin, Secretary."

I made an agreement with the Trustees as to the disposition of this stock in the event I ceased to be a director. The agreement with reference to the qualifying shares is in the minutes of the Trustees. I do not know what the actual agreement is.

The substance of such agreement was then read into the record as follows: "The Secretary reported that all but five of the Directors had signed Agreements to the effect that upon death, insolvency, attachment, or upon ceasing to be a director in either of the affiliating institutions, they or their heirs, assigns or personal representatives would forthwith retransfer to the Trustees, certificates for their qualifying shares of stock in each institution upon receive-

Allen P. Dodd—Direct

ing from the Trustees' Participation Certificates of Interest for an equal number of shares thereof, upon the basis of a par of \$100.00 each." This agreement or the substance of the agreement appears in a photostatic copy of the minutes of the Trustees for June 14, 1927. Neither I nor any other director signed any other agreement with reference to our qualifying shares. At the time of the consolidation or agreement trusteeing the stock there was no agreement of any kind that the members of the board of directors of either institution should remain the same.

I received the dividends on the qualifying shares in the Louisville Trust Company and in the National Bank of Kentucky. There were no strings of any kind attached to these dividends. I continued to function as a director of the National Bank of Kentucky until January, 1930.

The amendment to the articles of the Louisville Trust Company, increasing its capital stock, is recorded in the minutes of that company for March 15, 1929. (Plaintiff's Exhibit 126.)

The minutes of January 16, 1929, set forth the plan which was adopted for the acquisition of the Louisville National Bank and Trust Company and the absorption of that company into the Louisville Trust Company. Such minutes recite in part "that the Louisville Trust Company shall cause to be issued to the shareholders of the Louisville National Bank and Trust Company pro rata 7500 shares of the Trustees' Participation Certificates in return and exchange for 7500 shares of the Louisville National Bank and Trust Company stock, being its entire capital stock, carrying with it all the stock of the Louisville National Company, which the shareholder of the Louisville National Bank and Trust Company contribute and which stock, so contributed, shall be delivered to the Louisville Trust Company." These 7500 Trustees' Participation Certificates were the only con-

Allen P. Dodd—Direct

sideration which passed to the shareholders of the Louisville National Bank and Trust Company and Louisville National Company for their stock.

When I became a director of the National Bank of Kentucky there were thirty-four directors. Nineteen of them had constituted the former board of the National Bank of Kentucky and fifteen of them had constituted the former board of the Louisville Trust Company. At the time of the trusteeship of the stock of the Bank and the Trust Company I knew the officers and directors of the Bank and that they had the highest reputation as bankers and officers of banks.

The National Bank of Kentucky made loans through a loan committee consisting of eight vice-presidents who were experienced at making loans. They were bankers of long standing and had been connected with banks for a long time. Mr. Angermeier was President of the old German Bank. Mr. Ormsby was Vice-President of the National Bank of Kentucky and had previously been President of the old Southern National Bank. Members of the Bank of Kentucky loan committee were not directors of that bank, except Mr. Angermeier, Mr. Akers, Mr. Ormsby and Mr. Hayes. The other four members of the loan committee were not directors of the bank.

Vice-presidents of the bank who were not directors did attend directors' meetings. The bank's auditor was Mr. ZurSchmiede. The National Bank of Kentucky minute book, meeting for March 30, 1923, gives the following authority to the banks' auditor: "After careful investigation your committee recommends that the Auditor of the bank be given full and complete authority to make examination of any department of the bank at any time, in such manner as he may see fit. We recommend that this new authority of the auditor be as complete as that of a National Bank

Allen P. Dodd—Direct

Examiner or Clearing House Examiner. In this connection it is further recommended that the auditor report directly to the Cashier of the Bank." This committee's report was adopted. The Bank of Kentucky directors met once a week usually with full attendance.

I was present at most of the meetings of the Bank of Kentucky from June, 1927, to January, 1930. To show what was done at these meetings I will read out of one of the minutes. First, a statement of the condition of the bank and consolidated statement of the National Bank of Kentucky-Louisville Trust Company as of February 6, 1930, was read. A statement of the Bank was first always read, at the opening of the meeting. Next, a list of all loans taken the week before, up to Thursday, the day before the meeting of the Board on Friday, and known as the "clip-sheet," was submitted in writing to the Board. That list shows the name of each borrower, the line of collateral and the amount of the loan, all the information that was necessary for the directors to know about the particular borrower. Those clip-sheets came to the Board as a report of the loan committee with respect to loans taken the previous week up to the close of the banking business the day before the meeting. Before those loans reached us they were supposed to have been approved by the loan committee, under the rules of the Bank.

None of the Vice-Presidents who attended those directors' meetings criticized the loans that came through on such reports. Once a month there was read to the Board what was known as the "\$50,000 And Over" book. Loans of \$50,000 on up were read to the Board so as to keep the total of any one borrower before the Board. On an average about 500 loans would come before the Board each week.

The Bank of Kentucky had about 200 employees. From 150 to 160 were engaged in making records of the Bank.

Allen P. Dodd—Direct

Bank of Kentucky had a great many files. The Bank occupied the ground floor of two buildings and part of a third building at Fifth and Main streets in Louisville until it closed. The Banks' records were kept in the bank building. I do not know where the Bank kept its newspaper clippings file. The Banks' board of directors meeting lasted from one and a half to two and a half and sometimes three hours. There was a general discussion of the affairs of the bank.

122—Coming down to the Examination Reports of the National Bank Examiners: Were they read to the Board?

A.—They were supposedly read in haec verba, that is, read out to the Board.

123—By whom?

A.—Mr. Brown.

124—Was one of the other officers present when that would be done?

A.—Yes.

125—Was there any suggestion by any officer of the Bank other than Mr. Brown that he was improperly reading the reports?

Mr. Marx: I object to that.

The Court: Objection sustained—any suggestion he was reading the report incorrectly?

Mr. Crawford: Yes. That was the whole issue involved in the directors' case.

126—When Mr. Brown would read these reports, did any of the officers present, other than Mr. Brown, including the Cashier, ever suggest that Mr. Brown was not reading material parts of the report?

A.—They did not.

127—Did he always read the reports correctly, as you have now found out?

Mr. Marx: I object to that. The reports were there and he could have looked at them at the time.

Allen P. Dodd—Direct

The Court: Overruled.

A.—No; he did not; he deleted such parts of the Bank Examiners' reports as he saw fit and only submitted to the directors such parts of the reports as were not critical of the officers and directors of the bank and the large lines of the bank.

Mr. Marx: I object and move that that be stricken out of the record.

(At this point there was a long argument. The Court overruled plaintiff's objection and directed that the question be read. The question was read by the reporter.)

The Court: And you have answered that he did not?

A.—Yes.

No National Bank Examiner came before the Board of the Bank while I was on the Board. I was not a member of the Bank of Kentucky board of directors after January, 1930. I have learned that Mr. Wood did come before the board May 16, 1930.

Mr. John S. Wood, Chief National Bank Examiner, testified in the case of *Anderson v. Akers*. His testimony is found in the record in that case in volume 1, rebuttal and surrebuttal beginning at page 120 and continuing on to page 246. The Directors also testified on the question of what occurred at that meeting. In that case there was a decision by the Master on the question of what took place at that meeting.

The special section of the Master's report given over to the May 16, 1930, meeting begins at page 468 of Volume 1 of the record in the case of *Keyes v. Akers*, later *Atherton v. Anderson*, and runs through to page 477. Plaintiff filed exceptions to that section to the Master's report. This section of the Master's report is Exhibit A attached to the amended and supplemental answer of defendants William S. Speed, Saunders P. Jones and Allen P. Dodd.

Allen P. Dodd—Direct

The transcript of the record in *Keyes v. Akers*, later *Anderson v. Atherton*, marked for identification "Defendants' Exhibit No. 1," and filed in evidence.

It was stipulated that the answers filed on behalf of the Administrator of the estate of Henry Vogt, deceased, should be considered the answer of all defendants in this case who were directors of the National Bank of Kentucky and defendants in the *Anderson v. Atherton* case.

In the *Atherton* case plaintiff's exception to the rulings of the Master with respect to the May 16, 1930, meeting may be found in Defendant's Exhibit 1, volume 1, page 701. There was no appeal by the plaintiff in the *Atherton* case from Judge Tuttle's ruling on those exceptions.

Plaintiff's bill of complaint, with reference to dividends declared and paid by the National Bank of Kentucky appears in Defendant's Exhibit 1, page 133, section 431 of the bill of complaint. As the defendant in that case I filed a general traverse of the whole bill.

Plaintiff filed exceptions to the Master's ruling on the subject of the alleged illegal payment of dividend by the Bank. The District Court's ruling on plaintiff's exception are found on pages 846 and 847 of Defendant's Exhibit 1. There was no appeal taken by the plaintiff from that ruling. And the opinion of the District Court was carried into a judgment, section 55 of the decree, page 960.

Banco Kentucky Company was first considered by the board of directors of the National Bank of Kentucky in the spring of 1929. The minutes of the board meetings of June 7, 1929, show the following resolution with respect to Banco Kentucky Company, "Mr. Brown's proposition to form a new company with a proposed capital of \$20,000,000 organized to own stock of other corporations, all, or any part, buy and sell securities, original and refinancing, etc., was submitted to the Board of Directors expressed

Allen P. Dodd—Direct

themselves as favorable and on motion duly seconded and unanimously carried the President was authorized to proceed along the lines outlined."

That, generally speaking, was the plan of Banco. It never was changed. In the formation of the company, there was put into the Articles of Incorporation the powers to do the business set out in that resolution. After the formation of the company a letter July 19, 1929, was sent to all Trustees' Participation receipt holders. Section 3 and section 6 of that letter refer to the same thing that I referred to in this minute. I never saw the letter of July 19th until after it was sent out although I was a director. I first saw it after my return to the city about July 22nd, 1929.

BancoKentucky Company was a separate and distinct organization from the National Bank of Kentucky.

187—Was there any reorganization of the bank following the formation of the BancoKentucky Company?

Plaintiff's objection was overruled by the Court.

A.—The National Bank of Kentucky was not reorganized, nor the Louisville Trust Company, by the organization of the Banco Kentucky Company.

Plaintiff's motion to strike the answer of the witness from the record was overruled by the Court.

There was no change in the charter of either the National Bank of Kentucky or the Louisville Trust Company after the formation of BancoKentucky Company. There was no contract or agreement of any kind between BancoKentucky Company and the National Bank of Kentucky relative to the business of those companies or relative to the management and running of those companies. The only connection was that the Board of Directors of the BancoKentucky Company was made up of the boards of the two banks. There was no written agreement or understanding regarding the managements of those institutions.

Allen P. Dodd—Direct

The purposes discussed in the formation of Banco when the Board of Directors of the Bank of Kentucky adopted this resolution that we have just read to you was thoroughly analyzed before I left Louisville in 1929. I left Louisville, I think, June 28th, or 29th and got back on July 22nd, as I recall. All of these matters were gone into by the Board and this letter was sent out while I was away, and I found it on my desk when I returned. The purposes for which this company was formed, as discussed by the Board and what the members themselves intended to do about it—that is what I knew about it before I left—the charter had already been secured. The principal purpose of the new institution was to own or to go generally into the security business, to own an interest in banks in the Ohio Valley, which was including the majority interest in the Louisville Trust Company and National Bank of Kentucky. . . .

And the purpose of the organization of this corporation at that time, one of the main things that I had in mind, and as shown from the charter of the corporation, I believe, was to get into the investment banking field. It was believed by me, if you are going to limit it to me, that there was a great opportunity here to do that kind of business, because the industries in this city could not get the financial assistance inside of Louisville that I thought could be furnished by this company. Now, there is a field of investment, and opportunity for profit, that was discussed. That was the matter of first mortgage—real estate first mortgage bonds and the market for them at the National Bank of Kentucky. We always had requests from out in the country for investments, first mortgage bonds, from bank depositors who were undertaking to get them for their customers, and could not find first mortgage bonds sufficient for the need. There was a profit in it for anybody who could get them. The Banco Kentucky Company was organized to originate

Allen P. Dodd—Direct

first mortgage bonds—title insurance, title examinations and the floating of first mortgage bonds. It went so far, before the company was formed, as to have a complete outline of the business with Mr. Hugh Fleece at the head of it. All those matters were gone into. It was felt that by acquiring an interest in banks in the Ohio Valley that it would be a great avenue for the underwriting and placing of bonds, and the BancoKentucky Company could make a great deal of money along that line in the investment banking field and originating of securities.

193—Was that discussed generally in the Board?

A.—Yes, it was discussed very generally. The capital structure of the corporation was fixed at 2,000,000 shares to be sold at \$25 a share, or \$50,000,000. The disposition of that stock was discussed before I left here, and it was believed that they could acquire half of the Trustees' Participation Receipts and would not need to use any more than 700,000 shares of the stock for that purpose. That would leave 1,300,000 shares of stock for sale. The whole plan of Banco was conditioned from the beginning on there being a large reserve of cash of not less than \$30,000,000.00. It was considered at the meeting of the Board of Directors, the last meeting I attended before this corporation was subsequently organized.

There were no secrets about Banco at all. It was public property. Everybody knew what was going on all the time. There was no secret about it at all. The plan of the proposed formation of BancoKentucky Company was published generally in the newspapers. The newspaper article that follows the meeting of July 19, 1929, carried the general outline of the scope of the BancoKentucky Company.

There never was any discussion at any of the meetings of the board of directors of the bank, prior to the formation of the BancoKentucky Company, that the bank might be

Allen P. Dodd—Direct

in a failing condition. Speaking for myself it was far from my mind to even question the solvency of the National Bank of Kentucky because it was thought by me to be a perfectly solvent company, one of the best banks in this section of the country, as good as any bank could be. Every quarter during all the time I was on the board, and for years before, the Bank declared a dividend of \$160,000 a quarter. I heard no criticism of the legality of those dividends, or any criticism of the Bank for the way it was managed at all. I knew there was a regulation in the Banking Act which required notification to the Comptroller when a dividend was declared.

There was absolutely no purpose on my part, at the time of the formation of Banco, and in helping to bring about its organization, to transfer my stock to it as a fraud on the creditors. I never thought of that. In the formation of Banco, at any meeting I attended, I never heard any discussion of the probability of my shares being liable to assessment. It never was mentioned. I never heard it discussed and never thought, myself, of the question of double liability during the whole time the matter was discussed.

Mr. A. J. Carroll, a very able Louisville lawyer, who has practiced for a long time, actually prepared the Articles of Incorporation of the BancoKentucky Company. I never heard any discussion in the Board or outside the Board as to whether or not there should be put in the Company's Articles a provision that the private property of the stockholders should not be liable for the corporation's debts. I never heard any discussion, in the Board or out of the Board, that it would be a good idea to organize Banco for the purpose of allowing the stockholders to exempt themselves from the liability imposed upon bank stockholders. I never heard it mentioned during the whole time that I was in the discussion leading up to the organization of the BancoKentucky Company.

Allen P. Dodd—Direct

I did not transfer any of my stock to Banco. I only had twenty shares and I kept them for the purpose of qualifying myself as a director in each institution. Originally I had twenty shares in the Louisville Trust Company. Then I got ten shares of Louisville Trust Company and ten shares of National Bank of Kentucky. In January, 1930, when I left the Board of the Bank of Kentucky, I surrendered my stock in the National Bank of Kentucky and got Trustees' Participation Receipts. I deposited half of the Trustees' Participation Receipts and got 100 shares of the stock of Banco Kentucky Company. I bought 800 shares of Banco stock for \$20,000.00, signing the usual subscription for it at \$25.00 a share. If I had thought about double liability or any liability on this stock I would never have bought a share of it. I didn't dream of any liability.

Defendants offered in evidence copies of the notices sent by the Cashier of the Bank to the Comptroller of the Currency with respect to dividends as of April 1, 1927, July 1, 1927, October 1, 1927, January 2, 1928, April 2, 1928, July 2, 1928, October 1, 1928, January 2, 1929, April 1, 1929, July 1, 1929, October 1, 1929, January 2, 1930, April 1, 1930, and October 1, 1930. Said notices were ordered filed as part of Defendant's Exhibit 2.

Prior to January, 1930 there were thirty-four directors of the Bank who were also directors of Banco. In January, 1930 fifteen directors retired from the Bank Board. Banco originally had forty-nine directors, made up of the nineteen of the old National Bank of Kentucky Board, fifteen of the old Louisville Trust Company Board, and fifteen from the old Board of the Louisville National Bank and Trust Company. At the election of directors in January, 1930, all of the officers of the three banks were eliminated from the Banco Board, leaving the Board, as I remember, at thirty-four. The former directors of the Louisville National Bank

Allen P. Dodd—Direct

and Trust Company remained directors of Banco, but they were never directors of the Bank of Kentucky. After January, 1930 the Banco Board had thirty members who were not directors of the National Bank of Kentucky. Only nineteen members of the Banco Board were directors of the National Bank of Kentucky. Thirty-four members were elected to the Banco Board in January, 1930.

Of the thirty-four Banco directors there were fourteen who were directors of the National Bank of Kentucky and the remainder, twenty, were directors of the other two institutions, the Louisville Trust Company and the Louisville National Bank and Trust Company. A number of the original Board of Directors of Banco were dropped. They were officers and directors of the Bank other than Mr. Brown and Mr. Bean.

Banco began to function actively on the 19th or the 20th of September, 1929. It had received its Charter July 19 and had then set out this prospectus, but it began to function on September 20th, 1929. It opened a set of books and thereafter its acts or doings were reflected by those books until the receiver was appointed.

Banco continued to purchase interests in banks from that time until it closed. It continued to have separate meetings of its directors and transact its affairs until, in June, 1930, it acquired a half interest in Caldwell & Company. It bought some stock in the Union Central Life Insurance Company in December. Its directors met regularly and separately and had reports from its officers like any other corporation and performed the functions it was organized to perform as far as it could. It had some obstacles in the way of accomplishing what it started out to accomplish, but it was making effort at each meeting to carry forward the original plan that was entered into.

• The banks it purchased in part or in whole were the Pearl Market Bank & Trust Company, the Brighton Bank

Allen P. Dodd—Direct

& Trust Company, the Central Savings Bank & Trust Company, the Peoples' Liberty Bank & Trust Company, the First National Bank of Paducah, the Security Bank of Louisville, and the Ashland National Bank.

Plaintiff's objection to the question regarding the consideration paid by Banco for the banks was sustained and defendants made the following avowal, to-wit;—The banks were bought and paid for partly in cash and partly by stock. Some of them were paid for entirely by stock.

I have before me an exhibit made by Mr. Shuck, showing how much stock of the Banco Kentucky Company was subscribed for and taken by a holder of Trustees' Participation Receipts. Mr. Shuck kept those records and he will identify this exhibit.

394,000 shares of Banco stock were sold for cash,—\$9,862,000.00. These are approximate figures. The Trustees' Participation Receipt-holders purchased 198,000 shares and paid \$4,775,500.00 for it. This is aside from what they exchanged in Trustees' Receipts for Banco stock. I purchased 800 shares. I didn't exchange any until January, 1930 when I left the Board of the National Bank of Kentucky. I paid \$20,000.00 for the 800 shares I purchased.

Caldwell & Company was a very large investment banking house with its chief offices in Nashville, Tennessee. The purchase of that company's stock was discussed by the Banco Board at many meetings, possibly sixty days to ninety days before the contract was entered into. My reason for approving the contract with Caldwell & Company was that to me it was an opportunity to get into the investment banking business which we started out to go into, without the expense of building an organization, and it looked to me like this was a good opportunity to get into the security business, which was the main business I thought the com-

Allen P. Dodd—Direct

pany was organized for. Caldwell & Company was an investment banking house with offices in many, many cities throughout the United States. It had been in existence a considerable time and was a very reputable house in the South at that time. It was a large holder of insurance companies and industrial bonds and securities of every kind, and they sold a great many securities to insurance companies throughout the country. They handled municipal bonds, county bonds, and all kinds of real estate bonds and industrial bonds. It was represented to me that among Caldwell & Company's assets was the working control of the Inter-Southern Life. Inter-Southern Life, in turn, controlled the Missouri State Life. The Missouri State Life was one of the large stock insurance companies in this country. It was the third largest stock insurance company in the United States at that time.

Subscriptions for stock of BancoKentucky Company were due October 1, 1929. The call was made at a Board meeting on September 20, 1929. On September 20, 1929, the next day after the closing of the time for the deposit of Trustees' Participation Receipts and subscriptions, it was ascertained that the deposit of Trustees' Participation Receipts was beyond all expectation of anybody on the Board. It was almost unanimous and the Board set aside 1,150,000 shares of stock, exactly two shares for each Trustees' Participation Receipt out.

They had a report that there were 600,000 shares of stock that had been sold on subscription and there were only 250,000 shares left. Plans at once were set in motion to amend the Charter of the BancoKentucky Company, increasing its capital from 2,000,000 to 5,000,000 shares, because there was not sufficient capital available to furnish the character of service that the BancoKentucky Company was organized in the first instance to furnish.

Allen P. Dodd—Direct

Banco's Articles were amended. The matter was brought up before the Board at that time and later on, and discussed. Subsequently the Articles were amended, but they were confronted with the pre-emptive rights of the stockholders, and had to have waivers from them. Finally, in October, when this matter of amending was discussed to create the capital structure that was originally necessary to carry out the plan of the company, the stock market crash came—the security market went all to pieces and it was finally agreed to defer the amendment until January. At that time the Charter was amended, increasing the capital from 2,000,000 to 5,000,000 shares.

After the stock market crash, for the time being, no underwriting business could be done and no underwriting business was being done at all. After the stock market crash, you couldn't sell stock, you couldn't sell new issues at all at that time.

The Caldwell & Company contract was the first opportunity which presented itself to embark in the general business covered by investment banking. The matter was up for discussion time and again by the Board as to what they would do about placing this stock. The Caldwell & Company proposition came up and was discussed and it was felt that by this connection with Caldwell & Company, they could not only market the stock of the Banco Kentucky Company, but they could get into the investment banking field at once and to get the capital structure they had intended to have at the beginning.

It was reported that the only remaining portion of stock that could be sold was 250,000 shares and the Board authorized a contract to sell that 250,000 shares to Blyth & Company and Byllesby & Company at \$25.00 a share. This contract is referred to in the minutes of September 20, 1929:

Allen P. Dodd—Direct

"Motion was made, seconded and carried, authorizing the President, in his discretion, to close negotiations with broker or brokers for the sale of two hundred fifty thousand (250,000) shares of the Banco Kentucky Company stock at not less than Twenty-five (\$25.00) Dollars per share."

On September 27, 1929:

"Motion was made, seconded and carried, approving the contract with Blyth & Company and H. M. Byllesby & Company for the sale of two hundred fifty thousand (250,000) shares of the Banco Kentucky Company stock at Twenty-five (\$25.00) Dollars per share."

I did not know at any time prior to the middle of 1930 that this transaction was not a sale. I did not know that it was not a sale until the summer of 1930. I had some indication of it. It never was intimated to the Board during that period that we did not have a fixed contract for the sale of that stock to Blyth and Byllesby, at any meeting that I attended. I never thought the contract was not in existence. I thought it was a fixed sale. The question never came up before the Board at any time as to why the money was not received from that transaction at any meeting when I was present that I recall.

Defendants offered in evidence Defendants' Request for Admissions.

Defendant offered the pleading, the testimony, the opinion and decision in the case of *Venhoff and Hillen v. Anderson* in evidence. Plaintiff's objection to any of the record or proceedings being received in evidence was sustained. Defendant then offered the pleadings, evidence and judgment in said case, as an avowal, and the same were marked for identification, "Defendant's Exhibit No. 3."

I never saw or heard of the letters filed in the record in this case by plaintiff from Mr. Bean, Mr. Vaughan and

Allen P. Dodd—Direct

other people to the Bank and from the Bank and letters from the Federal Reserve Board. They were never presented to the Board or its attention called to them at any meeting I attended. I never saw any of the letters from the Comptroller to the Board. I didn't know any had ever been written by the Comptroller while I was on the Board.

It was claimed in the case of *Keyes* against *Aker* that the letters from the Comptroller reached the members of the Board of Directors and evidence was introduced by the Receiver in that case to sustain such claim.

The Court then ordered that the record in the Director's suit be a part of the record in this case.

Neither at the time transfers of Trustees' Certificates was made to Banco or before that was there any agreement or arrangement of any kind relative to what dividend Banco would thereafter pay. When the company started active operation it had a great many cash subscriptions for its capital stock. To my knowledge none of the directors gave any assurance to any person transferring Trustees' Certificates that their dividends would thereafter be the same.

Plaintiff's objection was sustained and the witness' answer limited to assurances with respect to dividends by non-officers-directors.

I knew of no plan that had been made or any contracts of any kind having been made for using up the money taken in by Banco Kentucky Company. At that time there was no way of ascertaining how much money the money taken in would produce by way of interest or profit. Banco would necessarily have expenses.

The president of Banco was James B. Brown. Its Secretary-Treasurer was Tom ZurSchmiede.

Plaintiff's objection to the question of whether or not it was contemplated that the Banco Kentucky Company

Allen P. Dodd—Direct

would be an active operating company was sustained, and the following avowal made:

It was contemplated and discussed by the directors of Banco that Mr. Brown, due to its activity, would retire from the presidency of the Bank of Kentucky and devote all of his time to the BancoKentucky Company. That was discussed in a Board meeting in the latter part of 1929 and in January, 1930.

I don't know about BancoKentucky Company having separate quarters in the Bank Building in 1929. Its quarters were just in the Bank Building. There was a discussion in the Board as to separate quarters for Banco. Time and again during the Fall of 1929 and the following Spring it was contemplated and discussed. Various surveys were made of quarters for the BancoKentucky Company. The directors and officers made inspections of quarters in the Louisville Trust Building and then they inspected some property over there that ran off the Louisville National Bank Building on Fifth Street that they could make offices for the BancoKentucky Company separate and distinct from the other Bank. They made an inspection of the third floor of the Louisville Trust Building to see whether that was available or could be used as an office for the Banco-Kentucky Company. Banco did not immediately have a separate and distinct office because the directors of the Bank of Kentucky argued over which of the two institutions, the Bank of Kentucky or the Louisville Trust Company, would take the quarters at Fifth and Market, and which would take the quarters at 421 West Market, which was the new Bank Building of the old National Bank & Trust Company. That was around June, 1930, I believe. They never did come to an agreement as to which building the Bank of Kentucky was going to occupy, and which building the Louisville Trust Company was going to occupy.

Allen P. Dodd—Direct

For that reason they didn't know how much of the building the BancoKentucky would occupy if it did occupy the Louisville Trust Building. That was the discussion of the Board of Directors of the Bank of Kentucky and the Louisville Trust Company and BancoKentucky Company, which Board was made up of the same people.

BancoKentucky Company had Mr. Brown as President and Mr. ZurSchmiede as Secretary-Treasurer because they were elected by the Board of Directors.

Mr. Brown was an outstanding banker in this community and was regarded as the leading banker of Louisville and of Kentucky. Mr. ZurSchmiede was certainly a very competent auditor and was about as competent a man as we could ever get to act as Secretary-Treasurer of the BancoKentucky Company. Mr. Brown was a director of a great number of corporations in Louisville. As I remember, the Louisville & Nashville Railroad Company, the Standard Oil Company, the Jockey Club, the Bank of Kentucky and the Louisville Trust Company, and he had varied and extensive interests and connections here in Louisville. He had been prominent nationally in the past as a member of the Securities Commission, or those bankers who handled the Liberty Loan Bond under President Wilson. He was appointed at the instance of William Gibbs McAdoo and is credited with having suggested the sale of Liberty Bonds to the public by public subscription. Mr. ZurSchmiede had been with the Bank a long time, had grown up with it, and was a competent auditor and was elected cashier of the Bank. Mr. Brown went in the banking business in 1911 and he proceeded through the National Bank of Commerce and in 1912 was made President. The National Bank of Commerce was unified with the National Bank of Kentucky in 1919. Mr. Brown became President of the unified or consolidated Bank and remained with that Bank until 1930 as President.

Allen P. Dodd—Direct

I never authorized anyone or heard anyone in authority in the BancoKentucky Company authorize any person to represent or hold out the BancoKentucky Company as a holding company merely. Mr. ZurSchmiede was not given any authority by either myself or the Board of Directors, either written or verbal, to hold out the BancoKentucky Company as a holding company only in an application to the Chicago Stock Exchange or the Louisville Stock Exchange. No officer of the Bank in the solicitation of stock sales or otherwise was authorized by the Board of Directors or by me, or anyone on the Board of Directors, as far as I know, to represent that BancoKentucky Company was a holding company.

I have referred to two buildings, one on Market Street, 421 West Market, and one on Fifth and Market. The Bank of Kentucky was occupying a different building, the old Keller Building, the ground floor of the Keller Building on Fifth and Main. It was renting it. Up until the date of its close it occupied the building at the northeast corner of Fifth and Main. 421 West Market Street was constructed before the Louisville National Bank & Trust Company was absorbed by the Louisville Trust Company. After the consolidation, the Louisville Trust Company occupied the building at 421 for a while and then remodeled the building over at Fifth and Market and moved into that building, after the agreement between the two institutions that the Louisville National Bank would take the building at 421 West Market.

I have seen the table of Excess of Net Earnings Over Dividends filed in this suit by Mr. White.

Plaintiff's objection to a question concerning an exhibit, purporting to show the excess of net earnings over dividends, prepared by Carl Lutz, an expert with Lybrand, Ross Brothers & Montgomery, of Chicago, filed in *Atherton*

Allen P. Dodd—Cross

v. *Anderson*, was sustained, and defendants made the following avowal:

The net earnings shown on the Lutz statement do not correspond with the net earnings shown on the statement White filed in this case.

Table, showing comparison of quarterly net earnings of the National Bank of Kentucky per its books, with the dividends paid, received in evidence, marked for identification "Defendant's Exhibit No. 4."

Semi-annual earnings statements of the National Bank of Kentucky, from June 30, 1927 to June 30, 1930, received in evidence marked for identification "Defendant's Exhibit No. 5."

Certified copy of the list of record shareholders of the National Bank of Kentucky, as of July 7, 1930, received in evidence marked for identification "Defendant's Exhibit No. 6." It was stipulated that said record, Exhibit No. 6, continued in the same way until the closing of the Bank.

From the Exhibit prepared by Mr. Shuck I made a tabulation of the stock purchased by directors of Banco Kentucky Company. As of September 19, 1929, upon the clearing of the subscriptions to stock, directors subscribed for 53,920 shares at \$25.00 a share, making a total of \$1,348,000.00. Mr. Shuck's Exhibit shows the directors owned 71,757½ Trustees' Participation shares and the directors exchanged those Trustees' Participation shares for Banco shares in addition to the above purchases.

Cross-examination of Allen P. Dodd by Mr. Marx

Early in the 20's, it may have been 1922, I became a director of the Louisville Trust Company Board. At that time the Trust Company was an independent institution, purely a trust company, organized under the laws of Kentucky. I acquired my stock in it before I went on the Board,

Allen P. Dodd—Cross

twenty-five or fifty shares, as I remember. Then I sold some of it and finally had ten shares and then I got ten shares more in 1927, before the unification. At that time I did not own any stock in the National Bank of Kentucky and I never bought any. I always owned Trust Company stock and I deposited that stock with the Trustees and had issued to me, in lieu thereof, ten shares of National Bank of Kentucky stock and ten shares of Louisville Trust Company stock. Prior to the unification of the Bank and Trust Company I owned no National Bank of Kentucky stock. Before the unification, the National Bank of Kentucky was an entirely separate institution from the Louisville Trust Company. On April 22, 1927, the National Bank of Kentucky and the Louisville Trust Company were unified under the Trust Agreement.

Upon the unification of the Bank and the Trust Company, I became one of the Trustees. Mr. Kennedy Helm and Judge Alex Humphrey collaborated and prepared the Trust Agreement. I had no connection whatever in its preparation. I was elected a Trustee under it and accepted the trust. My associate Trustees were Henry Vogt, Thomas Minary, Charles H. Bohmer and Edwin M. Drummond. Three of these represented the National Bank of Kentucky; Mr. Vogt, and Mr. Minary were from the old National Bank of Kentucky Board and Mr. Bohmer, Mr. Drummond and myself were members of the old Louisville Trust Company Board. Stewart Duncan was a member of the old National Bank of Kentucky Board. Three of the Trustees were recommended and elected by the National Bank of Kentucky and three were recommended and elected by the Louisville Trust Company Board.

After the unification, I became a member of the Board of the National Bank of Kentucky. Each member of the Trust Company became a member of the Bank's Board of

Allen P. Dodd—Cross

Directors and every member of the Bank's Board became a member of the Trust Company's Board. As provided in the Trust Agreement, beginning with April 22, 1927, down to January 1930, two and a half years, the same identical men were directors of both the Bank and the Trust Company.

324—Now, beginning with April 22, 1927, the same identical persons, the same identical individuals were stockholders of both banks?

A.—I didn't say from the beginning they were, Mr. Marx, because all of that stock did not come in for deposit for quite a while after that Trust Agreement was entered into. The greatest majority of it did, and Trustees' Participation Receipts were issued against it.

325—Allowing for the interval of time that it took, within a comparatively short period of time after April 22, 1927, the stockholders of the National Bank of Kentucky, and the stockholders of the Louisville Trust Company, were the same people?

A.—I couldn't say that, because I think there were five shares of Louisville Trust Company stock that were never deposited under that Trust Agreement. I may be mistaken about that.

326—Let's leave those out.

A.—You asked me to be exact. I want to be exact, though I may be wrong about that.

327—Except as to the possibility of five shares of Louisville Trust Company stock not having been deposited with the Trustees—except for that possibility of five shares—the same identical persons owned the stock of both institutions?

A.—Undoubtedly that is correct.

That situation continued from June 1927, the time of the consolidation until January 1930. The directors owned

Allen P. Dodd—Cross

their own individual shares. The Trust Agreement was dated April 22, 1927, but the qualification of directors under it was not until June 1927. The qualifying shares, the shares owned by the Trust Company Directors and the shares owned by the Bank Directors, were not deposited.

With the exception of directors, the identical persons continued to own the stock of both institutions.

Prior to April 1927, holders of \$100 shares of stock in the National Bank of Kentucky simply had a certificate for one share of par value \$100 stock in that bank. That share of stock was subject to double liability under the National Banking Law. Likewise, prior to April 1927, a shareholder who owned one share of stock in the Louisville Trust Company had a certificate for one share of par value of \$100 in the Louisville Trust Company which was also subject to double liability under the laws of the State of Kentucky. I knew that.

As a matter of mechanics, the \$100 share of stock in either the Bank or the Trust Company was deposited with these six men as Trustees who issued a \$100 par value Trust Certificate which recited on its face, in substance, that the holder accepted and agreed to be bound by the Trust Agreement. The Trust Agreement was filed in both the Trust Company and the Bank.

After the stock had been deposited the six Trustees had physical possession of the stock of these two banks and had outstanding against it par for par, Trust Certificates. After the unification the individual stock holder owned an indivisible interest in both banks—the stock of the banks was in the Trust Estate. The proportion changed and instead of the Louisville Trust Company man owning \$100 of Louisville Trust Company stock which he had owned in the beginning, he owned \$80 of the National Bank of Kentucky, and vice versa, a man who owned \$100 of the Na-

Allen P. Dodd—Cross

tional Bank of Kentucky stock after the unification only owned \$80 of the National Bank of Kentucky and acquired a \$20 interest in the Louisville Trust Company. The proportion changed when the Louisville National Bank and Trust Company came in.

The mechanics of taking over the Louisville National, in substance, were that the Louisville Trust Company increased its capital by \$750,000 and that increase was deposited with the Trustees, who were directed to issue to the stockholders of the Louisville National Bank and Trust Company \$750,000 of Trustees' Participation Receipts. The Louisville National Bank went out of existence.

The Trustees issued to the former shareholders of the Louisville National Bank and Trust Company, one Trustees' Certificate for \$100, for each share of stock of the Louisville National Bank the stockholder had owned. The Louisville National Bank and Trust Company stock was acquired without putting up any money, by a merger and then the issuance of Trustees' Certificates. The stockholders of the Louisville National Bank exchanged the capital stock they owned in that bank for other capital stock in the form of Participating Receipts.

I don't know anything about Louisville National Bank and Trust Company's stock also being a unified stock or that it had an affiliate with it. I don't know about the Louisville National Company.

When the exchange of Trustees' paper for stock of the Louisville National Bank occurred, the shareholders' proportionate interest in the banks changed. The man who had formerly owned \$100 in the National Bank of Kentucky and who, after it was unified with the Louisville Trust Company, owned \$80.00, found his proportion of the National Bank of Kentucky stock reduced to \$70. \$20 represented his interest in the old Louisville Trust Company

Allen P. Dodd—Cross

and \$10 plus \$20 his interest in the new Louisville Trust Company. It was \$69 and a long fraction, but roughly 70% was National Bank of Kentucky stock and 30% was Louisville Trust Company stock merged with the Louisville National Bank & Trust Company. The agreement concerning the Louisville National Bank & Trust Company was made in January 1929, I think, and the final consummation was in May 1929.

The Louisville National Bank & Trust Company had built a building at No. 421 West Market Street, while it was a separate national banking institution. By the process of exchanging Trust Certificates and the acquisition of the assets of the Louisville National, the Louisville Trust Company acquired this new building with a side agreement that the National Bank of Kentucky would take it. The agreement was unenforceable on account of the statute of frauds.

Just after the merger on May 4, 1929, the Louisville Trust Company moved into No. 421 West Market Street.

Going back to April 1927, the Trustees had the power to vote all the stock unless directed by the Trustees' Participation Receipt holders to do otherwise. We had power to vote it in our discretion, unless we had instructions. The Advisory Committee had the right to direct us, but over and above that the Participation Receipt holders had the right to direct us. In case neither one did, we had the power to vote the stock as we saw fit. As a matter of fact, the Advisory Committee always directed us under the terms of the Trust Agreement. When we got directions we had to follow them. The Advisory Committee was the Board of Directors of the National Bank of Kentucky and the Louisville Trust Company, which was the same, as shown by the Trustees' Agreement.

As a matter of practice and as a matter of power the Board of Directors of the two institutions, the Trust Com-

Allen P. Dodd—Cross

pany and the Bank, directed the Trustees to vote for themselves and in that way had the power to perpetuate themselves in office so long as the stockholders permitted them to do it. The stockholders had the right to oust them at any time just as the stockholders in any other corporation can do, as all the Trustees' Participation Receipt holders had the right to direct the Trustees how to vote. I know of no other corporation in which the Board of Directors votes the stock, but I know of two unification agreements here in Louisville that vote the same way. Not quite the same lawyers drew them up.

I did not pay for stock in the Bank of Kentucky. I deposited 20 shares of Louisville Trust Company stock. At the time of the unification, I owned 20 shares of Trust Company stock. I deposited those twenty shares with the Trustees and got back 10 shares of Louisville Trust Company stock and 10 shares of National Bank of Kentucky stock and was then elected on the Board of Directors of the Bank.

I had to have stock to qualify. The Trustees had no right to give it to me. The Trustees issued to me 10 shares of Trust Company stock and 10 shares of National Bank of Kentucky stock and I surrendered to them the 20 shares of Louisville Trust Company stock. The Trustees never issued any stock to the directors who did not have either original stock of the National Bank of Kentucky or the Louisville Trust Company. I did not retain in my personal custody and possession these certificates of stock, but put them in the Trustees' box. I had no individual right of access to that box without the consent of the Trustees. I had the right to get my stock on demand. As an individual distinguished from a Trustee, I did not lose the physical custody and control of my stock certificates any more than any other agency. Every other director did the same thing,

Allen P. Dodd—Cross

except those who were not Trustees. They had no access to the box except as the Trustees who were holding it subject to their demand.

Each director made an agreement to surrender his stock, upon his resignation, to the Trustees and to take Trustees' Participation Certificates. The instant he ceased to be a member of the Board of Directors of the Bank, his interest in the qualifying shares ceased and he took Trustees' Participation Certificates. If a creditor of any director made a claim or levied an attachment on the shares of stock standing in the name of the director, it had to be surrendered to the Trustees under the Agreement. I don't know whether an attachment could have been levied but the Directors agreed to surrender such stock on that condition. I don't know whether a creditor could get such certificates. That is a question of law. The agreement sought to keep the stock so long as the director remained a director. If a director resigned or the stock was attached, it would disqualify him as a director because he would have to own the stock free. If a director's stock in either the Bank or the Trust Company was attached he would lose his stock interest under the Agreement. It would go to Trustees and Trustees' Participation Certificates would be issued for it. If he died, such stock would have gone under the Agreement to the Trustees, and then the Trustees would issue Participating Receipts to his estate. If a director died owning 10 shares of stock, his estate would not get 10 shares of stock in the National Bank of Kentucky, but would only get the equivalent of an interest of 8 shares in the National Bank of Kentucky and the balance in Louisville Trust Company. If his Agreement was carried out, the Trustees' Certificates superseded the stock. There wasn't any market in the stock at all. There was only a market in Trustees' Participation Certificates. That was all that was traded in.

Allen P. Dodd—Cross

If a person never owned any of the stock prior to unification and after unification purchased \$1,000 Trustees' Certificates and then was elected a director, the Trustees would issue stock to him out of the Trust Estate that had to qualify him, providing he brought in Trustees' Participation Certificates equal to the required number of shares. If a director were elected he could qualify, if he had qualifying shares, regardless whether he agreed to anything.

The following provision of the Trust Agreement was read:

"III. The Trustees shall hold all assets which shall come into their hands hereunder as one indivisible Trust Estate, the proportionate interest of each shareholder therein being represented by the certificates issued by such Trustees, and the Trustees agree to hold such estate upon the following trust, terms and conditions:

(1) They shall reassign to each person who shall be at the time of signing this agreement a member of the board of directors of The National Bank of Kentucky, or of The Louisville Trust Company, who desires and is eligible a sufficient number of shares of stock in such Bank and Trust Company to qualify him as a director in both institutions.

(2) The Trustees may, out of the shares owned by them, sell and assign absolutely to any holder of a Trustees' Participation Certificate desiring to be elected a director of either of said institutions, the number of shares of stock necessary to legally qualify him for such office. These provisions shall apply to any other stock acquired by the Trustees."

Under the Trust Agreement, the Trustees would have to issue qualifying shares if the director turned in enough Trust Certificates although the director had never previously owned a share of stock in the Bank or the Trust

Allen P. Dodd—Cross

Company. He would have to have Trust Certificates equivalent to the amount of stock he was to get. The Trustees had no right to issue him stock otherwise—the estate would never balance if they did.

In my case, I owned 20 shares of the Trust Company stock, which had I exchanged for 20 Trustees' Certificates representing, prior to taking in the Louisville National Bank and Trust Company, 80% National Bank of Kentucky and 20% Louisville Trust Company. Under the Trust Agreement my 10 shares of Trustees' Participation Certificates represented not only an 80-20 interest in the Banks, but it represented 20 units in the pool of the same value share for share throughout. If the Trust were distributed on the basis of proportionate ownership, for my 20 shares, I would only have received 4 shares of Louisville Trust Company and 16 shares of National Bank of Kentucky. I owned enough of an interest in the pool on the basis of trust certificates to entitle me to 10 shares of Louisville Trust Company stock because of the terms of the Trust Agreement under which the Trustees had to issue to me enough shares to qualify me.

At the time of the Trust Agreement in April 1927, I did not think of any stock assessment liability. I never thought of stock assessment liability at any time. In 1927, I considered the Louisville Trust Company a sound institution. I did not know anything about the National Bank of Kentucky, except what was reported to us. At the time of this Trust Agreement, I did not discuss the question of stock assessment. I didn't consider it because we had Judge Humphrey and Mr. Kennedy Helm to write the Trust Agreement. I would not have accepted the trust and assumed the liability on the stock. I knew there was liability on the stock; Section 66 of the United States Banking Code exempts Trustees from liability but I would not have

Allen P. Dodd—Cross

accepted the trust unless the Trust Agreement had provided for the double liability just like it did. I would not have left that for construction. The liability might not have been the same if the agreement had not provided for it.

454—Where we are getting is simply this, that at that time, in April, 1927, which was two and a half years before the stock market crash and two years before you organized Banco you did think of stock assessment liability?

A.—Yes, in connection with that.

455—And provided for it?

A.—Yes.

456—It is contained in Article IX?

A.—Yes.

457—Which you understand was a contract by every holder of a Trustees' Participation Certificate to pay any assessment that might be levied upon these banks that you held at that time of consolidation?

A.—It was put in the Trust Agreement and in the Trustees' Participation Receipts. That is right.

The \$100 Trustees' Certificates were split into ten \$10 Trust Certificates. The man who had held one piece of paper representing one share found himself the owner of 10 shares with a different par value. This was done in 1929 after the Louisville National Bank and Trust Company came into the picture and just shortly before we organized Banco. The \$10 Trustees' Certificates continued the same terms with respect to liability for the payment of stock assessments.

At the time Banco was organized, I was a member of the Board of Directors of the National Bank of Kentucky and of the Louisville Trust Company and I was also a Trustee and a stockholder of record in both institutions. I subsequently became a director of Banco Kentucky Company.

Allen P. Dodd—Cross

I didn't know that the day after the Trust Company moved into No. 421 West Market Street, the new building, the National Bank Examiner was in the National Bank of Kentucky. I remember when the Trust Company moved into No. 421 West Market Street, there was a public celebration with flowers and a dinner at the Pendennis Club on May 24, 1929. I didn't know that John S. Wood, Chief National Bank Examiner, moved into the National Bank of Kentucky on May 25, 1929, with a corps of bank examiners. He may have come there with a corps of examiners, but he didn't move in. It took a couple and sometimes three weeks to examine the National Bank of Kentucky. We had a Board meeting every week.

Before Banco was organized, since the same men were the Board of Directors of both institutions, we usually held our meetings on the same day and in the same place—the Board Room in the Louisville Trust Company, on the third floor—until the Louisville National Bank & Trust Company came in the Louisville Trust Company had a meeting once a month. The Bank of Kentucky met once a week. After the Louisville National Bank & Trust Company was taken into the picture, they had a meeting once a week. When the Louisville National Bank & Trust Company was at No. 421 W. Market Street, it had its board meetings over there and the Bank of Kentucky had its meetings at the Louisville Trust building and the Banco Board meetings were in the Louisville Trust building. Up until January 1930, we held our meetings at the same time and the same place. After the Boards were separated, that was not true. The first three months from September 1929, until January 1930, the meetings were held at the same place by the consolidated board. Always the meeting of the Banco Kentucky Company followed the meeting by the Louisville Trust Company and the National Bank of Kentucky unless there was a special meeting called.

Allen P. Dodd—Cross

The Louisville Trust Company meeting was held first, immediately following that, the National Bank of Kentucky meeting was held and immediately following that the Banco meeting was held. As a director I did not have to change my seat. We could sit there and after adjourning as one Board, met as the next. The only people who changed their seats were the different chairmen, different officers, different secretaries and with different sets of reports. The only people who changed their seats were the chairmen and secretaries of each institution.

As a director of the National Bank of Kentucky, I might have known that the Chief Examiner was there examining the Bank during the period of May 25th until approximately June 7th. I can't tell now whether I did or not. A lot of times we didn't know the Bank Examiner had been there until after the report was presented.

It is not true that when a Bank Examiner was there with a large staff I always knew it. Our meetings were not at the Bank building, but were at the Louisville Trust building and the Bank was at 5th & Main. There were several examinations made of the Bank while I was on that Board that I didn't know the Examiners were there until after the report came in. I never heard about the examination when Mr. Wood reported the large criticized loans were \$3,500,000, the loans to officers, directors, and employees were \$3,200,000 and slow assets were \$ and doubtful assets were \$, until after the Banks closed. That may have been in the National Bank Examiner's report when it reached there, but it never reached the Board of Directors.

495—You don't mean to say the report didn't come to the Board of Directors?

A.—I mean to say that no criticism was brought before the Board.

Allen P. Dodd—Cross

496—The Bank Examiner's report was always read in what you considered to be in haec verba, in answer to Mr. Crawford, but subsequently you learned that was not true?

A.—I said this, we were supposed to have got the reports read in haec verba, by Mr. Brown, but I found out he had deleted criticism. He never read any such criticism.

497—But, then, you did know the Bank Examination had been made?

A.—Oh, yes.

498—Because portions of it, at least, were read to you?

A.—Yes, and it was such a beautiful report, as read to us, that we thought the Bank was in fine shape.

499—Don't volunteer information; you are going to get a chance to argue the case. The Bank Examiner's report was there.

A.—There was a report there, yes.

500—The directors, as a matter of fact, and you have so testified in your own language, were free to take ~~that~~ report with them home and study it if they so desired.

A.—Correct.

I never heard Mr. Brown invite the directors to take the reports home and read them, but I have heard other directors say that.

The first official minute about the plan to organize Banco-Kentucky Company was June 7, 1929, but it had been discussed several weeks before that time. At that time, I did not know of the Comptroller's official letter to the Board of Directors of July 12, 1929. I heard afterwards that there was such a letter. None of these letters ever reached me while I was on the Board. I didn't know there was such a letter written from the Comptroller. Neither this letter, nor any of these letters were read to the Board or called to their attention in a regular or called meeting of the Board. There wasn't a letter of any kind from the

Allen P. Dodd—Cross

Comptroller's Office that came to me or my attention while I was on the Board.

The letter of July 12th, addressed to the Board of Directors, saying

"The report of an examination of your bank completed June 13th, a copy of which was sent you, has been received, and shows that the estimated losses were not written off, and a number of other matters on Page 11-1 needing correction. It is understood that plans are being developed whereby your bank will be consolidated with the Louisville Trust Company within ninety days, the continuing institution to operate under a State charter. If measures are being taken to consummate this arrangement, the matter of insisting upon corrections of the items listed on the page referred to will be postponed a reasonable time. Please; therefore, advise definitely not later than August 1, what steps, if any, have been or will be taken to carry out the plan in regard to the proposed consolidation";

was not reported to the Board. The Bank may have got the letter, but I never got a letter from the Comptroller.

On July 12, 1929, there was a special meeting of the Trustees following the regular meeting, but I don't seem to have been present that day. I was out of the city. I am familiar with the minutes of the Trustees. They had a special meeting on July 12th. The minutes are as follows:

"The Trustees, under Trust Agreement dated April 22, 1927, executed by the stockholders of the National Bank of Kentucky and the Louisville Trust Company, in accordance with a resolution adopted at a meeting of said Trustees this 12th day of July, 1929, hereby appoint and constitute the law firm of Miller and Chevalier, 922 Southern Building, Washington, D. C., as attorneys at law and in fact for the purpose of obtaining a ruling, as to whether the Trust, created by the said Trust Agreement, is an 'association,'

Allen P. Dodd—Cross

within the meaning of the Revenue Act of 1928, as applied to the provisions relating to stamp taxes and income taxes, levied under the said Act, with powers of revocation and substitution.

You are hereby authorized and requested to discuss with the above named firm, and in particular with Robert N. Miller, S. Lyman Barber, J. R. Sherrod, Ward Loveless, F. O. Graves, J. C. Ristine and Homer Hendricks, any matter pertaining to the above subject, the same as you would with the undersigned.

Respectfully,

Trustees, under Trust Agreement
dated April 22, 1927, between the
National Bank of Kentucky and
The Louisville Trust Company.

By CHARLES H. BOHMER,
Vice-Chairman.

Attest:

JOHN S. AKERS,
Secretary."

It seems that Mr. Vogt, Mr. Minary, Mr. Bohmer, Mr. Metcalfe, and Mr. Akers were present, Mr. Akers acting as Secretary.

I am not familiar with the discussion that was held in Washington. When I came back to the City, I found a copy of the letter of July 19th in my desk and I read it and went and discussed with Mr. Carroll the contents of that letter. The same day the Trustees passed a resolution reciting that upon the request and with the consent of the Advisory Committee, they authorized the Chairman or the Vice-Chairman and the Secretary or Assistant Secretary of the Trustees together with the proper officers of the National Bank of Kentucky and the Louisville Trust Company to cause to be filed the attached copy of articles of incorporation, and to approve and send to the holders of

Allen P. Dodd—Cross

Trustees' Participation Certificates the attached recommendation to exchange their Certificates for stock in BancoKentucky Company when organized in accordance with and subject to the conditions of the plan of re-organization therein set forth. These minutes were signed by Mr. Vogt and Mr. Akers as secretaries. Attached to these minutes were the articles of incorporation of the Banco-Kentucky Company.

I assume that Paragraph Eight of the articles read "the private property of the stockholders shall not be subject to the payment of corporate debts whatsoever" was in the original proposed articles attached to the Trustees' minutes. I don't know that I saw that charter at that time. I knew Mr. Carroll was preparing it.

The Advisory Committee referred to in those minutes were the identical men, man for man, who were the Board of Directors of the National Bank of Kentucky and the Louisville Trust Company. They were the ones who instructed the Trustees to cause the BancoKentucky charter to be executed. They were the ones who instructed the Trustees to put in "the private property of stockholders shall not be subject to the payment of corporate debts to any extent." That would be the ordinary thing to do in drawing a charter. I don't know that the Trustees had anything to do with it at all. But the Trustees resolved with the consent and at the request of the Advisory Committee, with the proper officers of the Bank and Trust Company, to cause Banco's articles to be filed. These articles were approved and caused to be filed at the request of the Board of the Bank and the Trust Company containing the words with reference to the exemption of the property of the stockholders and all the rest of the charter.

The actual request, personally signed by the officers and directors of the National Bank of Kentucky, dated July 12,

Allen P. Dodd—Cross

1929, is attached to those minutes. It requests this particular charter "approved by us and hereto attached, under the laws of the State of Delaware and having a capital stock of \$20,000,000, divided into shares of \$10 par value be filed," and "we hereby further approve a submitted form of letter to the holders of Trustees' Participation Certificates as hereto attached and request the Trustees' to cause the organization of such company and the submission of the proposed plan to the Trustees' Certificate holders, to the end of a re-organization of the allied interests."

The Advisory Committee directed the Trustees to have the charter of the BancoKentucky Company, exactly as it is here, recorded in Delaware to organize the company. The signatures on the request are the signatures of the officers and directors of the National Bank of Kentucky.

Also attached to the minutes of the Trustees is the letter of July 19th, 1929, which was subsequently sent out to all Trustees' Participation Certificate holders and the subscription to shares under the re-organization plan which was outlined in that letter, subsequently dated July 19th, but dated July blank in our minutes. The subscription refers to the fact that the shares of stock in the proposed company "shall be fully paid and non-assessable under the terms of the re-organization plan as outlined in the letter of July 19th, if, when and as said plan shall become effective."

Mr. Brown was elected an officer of Banco because he was a very prominent banker and Mr. ZurSchmiede was elected secretary because he was a very competent auditor. It is recited in a letter of July 19th, 1929, part of the Trustees' minutes of July 12, 1929, before Banco was formed, that it was an essential part of the re-organization that the BancoKentucky Company be managed and operated by the Boards of Directors and officers of the banks. It was part

Allen P. Dodd—Cross

of the plan of re-organization of the BancoKentucky Company, irrespective of this letter, that the first Board of Directors of BancoKentucky Company would be the Board of Directors of the Bank and the Trust Company.

There is nothing in the letter about "first Board of Directors" but I am telling about what the original plan was before I left Louisville. When I left, it was part of the plan that the Board of Directors of the Bank and of the Trust Company would be the first Board of Directors of the BancoKentucky Company. The letter states that it is an essential part of the re-organization, that a majority of the stock of the company be owned by the Trustees' Participation shareholders and that it be managed and operated by the Board of Directors and the officers of the banks. It was contemplated at the outset that Banco should be operated and managed by the banks' auditors and directors until the stockholders had an opportunity to elect a new Board. We couldn't provide that beyond the first meeting of the stockholders; the stockholders had a right to change that, as they did.

The Directors of BancoKentucky Company from the first of January, 1930, were made up principally of the non-officer directors to the two banks. Every non-officer director of the National Bank of Kentucky and of the Louisville Trust Company was at all times, without a single exception, a director of BancoKentucky Company. The President of the bank, James B. Brown, was at all times both President of the National Bank of Kentucky and BancoKentucky Company. The cashier of the bank, Mr. Zurschmiede, was at all times the Secretary-Treasurer of the BancoKentucky Company. Mr. Brown was a member of Banco's Board of Directors.

Of the 34 directors of Banco there were none who were not either members of the Board of the Bank or of the

Allen P. Dodd—Cross

Trust Company. Mr. Bean, President of the Louisville Trust Company, was likewise a director and Vice-President of BancoKentucky Company during the fall of 1929, but was not elected Vice-President at the January, 1930, meeting.

After the BancoKentucky Company was organized the Board of the Bank and the Trust Company continued to act as the Advisory Committee under the same Trustees' Agreement. The same individuals, members of the Board of Directors of BancoKentucky Company were the Advisory Committee of the Trustees.

The Advisory Committee were directors of Banco after they were elected to its Board of Directors and that Advisory Committee instructed the six Trustees how to vote the stock of the Bank and the Trust Company, on all occasions when it was necessary to elect directors. We did not elect any directors after January, 1930. The Banco-Kentucky Company didn't come into existence until July, 1929.

After Banco was organized, I know of no physical change in the possession or control of stock certificates of the Bank. That still remained in the hands of the six Trustees.

BancoKentucky Company could direct the Trustees how to vote the stock at any time because it owned the Trustees' Participation Receipts. The individuals who instructed the Trustees as the Advisory Committee, were the same individuals who were the Trustees' Participation Receipt holders.

I testified on direct examination about the purpose of the organization of Banco. I have previously testified on the same subject. I had forgotten that I was called as a witness in Case No. 205,223 Jefferson Circuit Court, Chancery Branch, First Division, Anthony J. Carroll et al, plaintiff

Allen P. Dodd—Cross

v. Chemical Bank & Trust Company, on November 23, 1937. I have been called in in nearly every one of these cases. I remember testifying in that case in Mr. Castleman's office. I was sworn as a witness and was examined by Mr. Kasfir and possibly Mr. Castleman.

In that case I was asked "On this notice of July 19, 1929, your name appears as signifying the approval of the Trustees, did you sign any approval" and I answered, "I approved,—I do not remember signing the approval—but I approved the whole plan of organization of the Banco-Kentucky Company before I left, but I did not sign or consent to any circular or consent that my name appear thereon." I was asked, "This circular of July 19, did that meet with your approval?" and I answered, "I saw it before they got through with it,—yes, I think I approved it." I still approve of it. When I came back to town, I got the letter off my desk and read it and went to Mr. Carroll and asked him about the term "Re-organization" and he explained to me that that was in connection with a tax matter. I never disapproved of this at all, and I never said I disapproved of it.

In that case I was asked "What was the purpose of the organization of Banco-Kentucky Company?" and I answered, "It was organized for the purpose of acquiring a chain of banks in the Ohio Valley." That answer was true—that was one of the purposes for which it was organized.

In that case I was asked: "Was there any intention at that time of the National Bank of Kentucky withdrawing from the Federal Reserve System upon the organization of Banco-Kentucky Company?" and I answered, "Only when we fully acquired a chain of banks in the Ohio Valley." It was the purpose of the Bank of Kentucky to act as the 'hub of the wheel'—that is the main 'link in the chain'—it was expected to acquire banks from Cincinnati along the Ohio

Allen P. Dodd—Cross

Valley and that we also acquire banks in Indianapolis and in Chicago." I made that answer and it is true.

I was asked: "You considered the bank and all member banks as one entire unit?" And I answered: "I considered the bank as accomplishing—more truly it was a chain of banks,—they were separate and distinct corporations,—BancoKentucky Company was organized under the laws of the State of Delaware,—" I remember then explaining the organization of Banco. It was separate and distinct.

I was asked: "Wasn't it the purpose of BancoKentucky Company to carry out functions and engage in enterprises that the National Bank of Kentucky could not engage in because of limitations in its charter?" And I answered: "Certainly,—and to buy stocks in insurance companies,—we had insurance companies that we discussed the assets and liabilities of very seriously, and very seriously considered the purchase of insurance companies,—it never intended that they should be limited to banks at all."

I was asked: "And that is, as I understand it,—that was one of the reasons for the organization of BancoKentucky Company, that is to create a corporation that could engage in business that was forbidden to the National Bank of Kentucky and The Louisville Trust Company because of the limitations in its charter?" And I answered: "That is correct. To acquire control of stocks in banks and other companies, there would not have been any purpose in organizing BancoKentucky Company if that had not been done."

I testified in my own defense in *Keyes v. Akers*, the directors' suit, in April, 1932. I said that the primary purpose of the organizers of BancoKentucky Company was to acquire a group of banks in the Ohio valley, and I still say that. I said this morning we intended to acquire a chain of banks, or acquire banks in the Ohio valley. I never testified

Allen P. Dodd—Cross

different from what is in there, and if you will take the whole deposition in the Keyes case you will find substantially the same testimony I gave here today.

The primary purpose of organizing the BancoKentucky Company was to acquire a group of banks in the Ohio valley in order to accomplish the very things I said this morning that we had in mind. The purpose was to acquire control of The Louisville Trust Company and Bank of Kentucky and was set out in the prospectus. After the organization of Banco and prior to October 1st they discussed the question of acquiring other banks. On September 11 they had this in the minutes: "The President then disclosed that negotiations with Cincinnati banks and matters relative to the sale of stock; whereupon, it was moved, seconded and carried that the President be authorized to proceed, in his discretion, with the matter of the Cincinnati banks and the sale of stock—reporting to the Board the proposition tendered." September 11 was before we had got stock sufficient to know whether there would be sufficient deposited or not to declare the plan of BancoKentucky effective. It was declared effective September 19, 1929. On September 11 we did not go ahead with contracts to buy two banks in Cincinnati. There were no contracts. But negotiations had been started. On September 25, 1929, they made a contract to purchase the Pearl Market Bank and the Brighton Bank. They started it before September 25. That is what I said, and that is what the minutes show. That did not by any means call for the practical exhaustion of the cash that was to be paid in on stock subscriptions. I cannot tell you what the purchase price of the two banks was. The exhibits show it.

The Banco plan as submitted was to sell the stock of BancoKentucky Company only to owners of Trustees' Certificates, but it was changed and made wide open to any-

Allen P. Dodd—Cross

body that would buy. The letter of July 19, 1929, states that it was to be sold only to holders of Trustees' Participation Certificates, but it was later changed.

I testified on direct examination about the amount of money we expected to realize and stated, in substance, that the Trustees' Certificate shareholders exchanged their stock in such large numbers that we did not have enough capital to sell to the public—to realize enough capital to go ahead. In the first place, under the original authorized capital, we had two million shares of a total par value of \$20,000,000.00 which, if sold at \$25.00 a share, would produce \$50,000,000.00. I knew at that time that there were outstanding 575,000 authorized Trustees' Participation Certificates less the number of shares owned by the directors. We will call it 570,000 odd. Under the plan each one of these 570,000 certificates of the par value of \$10.00 was to be credited for two Banco Kentucky Company stock certificates at \$25.00. We set aside 1,050,000 shares to make the exchange, on Sept. 19, after it was found out that the Trustees' Receipt holders had almost unanimously deposited their certificates for exchange. We urged them to deposit them. We did not think we would get any more than a majority.

I do not know anything about trustees of trust estates in this community, who were unwilling to make the exchange, being urged to do so for the reason that if they did not there would be no market for the Trustees' Participation Receipts after the plan was consummated. The officers didn't. I did not know that it was urged in the community that there would be a very narrow market, or no market, for the Trustees' Participation Receipts after the plan went into operation. I heard people trying to sell it saying that there would be no market, but we did not have anything to do with that, at least, I didn't. It would

Allen P. Dodd—Cross

be a broker's argument that the Trustees' Participation Certificate holders should exchange for Banco, that there would be no market for the Trustees' Certificates because the Trustees' Participation Certificates would be taken off the market. After the reorganization of Banco Kentucky Company and the exchange of substantially all the Trustees' Certificates there would be no market for Trustees' Participation receipts. There was an active market in Trustees' Certificates. It went up over \$50.00 after October 1. After all of them had been exchanged there wasn't any market. I am not denying that the argument that was made to induce the exchange was a true argument. I am just saying the Board of Directors didn't make it. I haven't any evidence that the officers of the Bank made it. They didn't tell me about it at the time.

I know there was an active campaign among the officers of the banks to induce Trustees' Participation Receipt holders to make the exchange and to purchase more stock. After 1,140,000 or 1,150,000 shares of Banco Kentucky Company stock had been set aside for exchange with Trustees' Certificate holders, that left 250,000 shares for sale. As reported to us, the balance of the stock was sold. That left, roughly speaking, 900,000 shares for sale, but we had a report at that time that we had already sold 600,000 shares. We did not make the allotment of 1,150,000 shares until September 20. At the beginning we thought we would use only 700,000 shares of this stock altogether for the exchange. 700,000 shares of Banco for conversion by exchange was just 50% of the outstanding T.P.C.'s. That is what we contemplated getting. 350,000 out of 575,000. It was over half. The plan stated that we must have a substantial majority, and I considered that a substantial majority.

657—Now, my question that the Court asked me to repeat is that after—as an arithmetical calculation—after you

Allen P. Dodd—Cross

provided 2 shares of Banco for every one Trustees' Certificate outstanding at the time the plan was submitted; how many shares would you have left for sale to the public or to the Trustees' Participation Certificate holders at \$25 a share?

A.—700,000 shares from 2,000,000 left 1,300,000 shares.

Mr. Marx: That is why I say this witness is persistently refusing to answer a very simple question.

The Court: Lead him.

Mr. Marx: I did try that.

The Court: Go ahead and ask him another question and lead him again.

Judge Dietzman: The gentlemen are obviously talking about two different times.

The Court: He is talking about the inception, when Banco was first launched—is that the time, Mr. Marx, that you are talking about?

Mr. Marx: I just want to know as a matter of arithmetical calculation—take my pencil and this piece of paper—

The Court: What time are you talking about?

Mr. Marx: When they started out.

The Court: That is what I mean.

The Witness: In June, July or September?

Mr. Marx: Before they had issued a single, solitary share—

A.—(Interrupting.) They had not issued any share until after September.

658—(Continuing.) —for either exchange or money.

The Court: Now, then, ask him a leading question and go ahead.

659—Put down how many trustees' certificates there were and multiply them by 2.

A.—You mean how many there were authorized?

Allen P. Dodd—Cross

660—How many there could possibly have been turned in for exchange?

A.—575,000, and twice that is 1,150,000 shares.

661—Subtract that from 2,000,000 and what is the answer?

A.—900,000.

662—Multiply that by 25 and what is the answer?

A.—\$22,500,000.

663—\$22,500,000?

A.—Yes.

If 1,150,000 shares of Banco were exchanged that would have left 850,000 shares which multiplied by \$25.00, would be \$21,250,000.00. Actually, 540,484 T.P.C.'s were exchanged for Banco stock, which left 920,000 shares of Banco for sale. That amount, multiplied by \$25.00, would be \$24,500,000.00. If we had, without increasing Banco's capital stock, sold all of the available shares of stock that we had for sale, it would have produced \$24,000,000.00. We did not sell near all of them. We had 5,000,000 shares before we got through.

We declared the plan effective September 20, 1929, and on that date we thought all of them had been sold or exchanged except 250,000 shares, or set aside for exchange. We had not sold all of them when we declared the plan effective. We declared it effective upon information furnished us by the officers and we afterwards found out it was not true. No officer of the bank told me they had sold \$24,000,000.00 worth of stock. I never said they did. Mr. Brown said they had sold 600,000 shares, which in money would be \$15,000,000.00, and we authorized the sale of 250,000 shares. There was a contract on that. It subsequently turned out to be just an option. The minutes say a contract of sale, but it turned out to be an option. Byllesby Company, Blyth & Company, Wakefield & Company, ac-

Allen P. Dodd—Cross

cording to the minutes had the option. I do not know who drew that option. We had several lawyers on the Banco-Kentucky Company Board. Lawyers on the Board were Mr. Carroll, Mr. Helm, Mr. Vaughan, Mr. Dodd, Mr. Hieatt, Mr. Dosker, Judge Garnett, Mr. Kahn, Arthur Rutledge, Leland Taylor and Judge Stites. I believe that is all the lawyers on the Board.

There isn't a bit of doubt and never has been any that the officers and directors of National Bank of Kentucky and the Louisville Trust Company and the holders of the Trustees' Participation Certificates representing the sum of those two concerns initiated and organized Banco-Kentucky Company, nor is there any doubt that they organized it with the intention that it should hold at least a majority of their own stock, of the stock of the Louisville Trust Company and National Bank of Kentucky represented by the Trustees' Participation Certificates. That was the stock of the men who organized Banco.

Banco was initiated at a series of meetings of the Board of Directors of the National Bank of Kentucky. That was the place where it was discussed. The same men were also on the Board of Directors of Louisville Trust Company. Although no reference is made to the organizing of Banco-Kentucky on the minutes of Louisville Trust Company, the same men who comprised the Board of Directors of National Bank of Kentucky, where it is discussed, were also members of the Board of Directors of Louisville Trust Company. I might say this, that it was discussed following the close of a meeting of the National Bank of Kentucky, that is, after the Bank's business was over, that is, Banco itself was discussed after their meeting and was recorded in its minutes when those that organized it felt the time had come to put it in. Before that time it was discussed

Allen P. Dodd—Cross

after the meeting and was not put in the minutes because it was not part of the minutes of the Bank of Kentucky.

When Mr. Carroll, a distinguished lawyer, took the articles of incorporation of the BancoKentucky Company to Delaware he was not, so far as I know, the attorney for the National Bank of Kentucky. The regular attorneys for the National Bank of Kentucky, as I understand it, at that time were Messrs. Selligman & Selligman. Mr. Carroll was employed, as I understood it, to draw the articles of incorporation for the BancoKentucky Company. He was employed by the people who were organizing the BancoKentucky Company, and that was the company that employed him. The Bank of Kentucky did not employ him. The individuals who organized BancoKentucky employed Mr. Carroll to prepare its articles and he represented the company, itself, in getting its articles and doing the legal work necessary to start it on its way. Those individuals were the officers and directors of the National Bank of Kentucky.

I referred in my testimony yesterday to the minute of June 7, but the decision to go ahead was made at a later meeting when they had finally rounded out the discussion where they wanted to go ahead.

The minutes of a meeting of June 21, 1929, recites:

“On motion duly seconded and unanimously carried the following resolution was adopted: ‘Resolved, that it is the sense of this meeting that a corporation of the character as outlined by the President at this meeting be formed, and Resolved further, that the President be and is hereby requested to report to the Board such details necessary for the organization of the company with his recommendations in regard to the organization connected therewith.’ ”

The company referred to in these minutes was subsequently named the BancoKentucky Company.

Allen P. Dodd—Cross

An examination of the National Bank of Kentucky was begun May 25, 1929, and closed June 15, 1929, and was finished before the June 21 meeting of the bank directors. The following statement from the bank examiner's report:

"Your examiner was advised that a plan was in contemplation whereby a sort of finance and holding company will be organized with a large capital stock, say \$20,000,000.00. The holding company will hold, amongst other things, the stock of the National Bank of Kentucky and its affiliated banks through a surrender and exchange of the stock of the bank for stock of the company on some satisfactory basis."

This was never read to the Board when the report of the examination was read. I never heard of it at any Board meeting. I cannot say whether it was correct or incorrect. I do not know whether the Examiner got that report from the officers of the bank.

On direct examination I referred to a Bank minute of June 7, 1929, at which time it was determined that a holding company of this general character should be formed. This examiner's report was finished June 15, only a week after our meeting of June 7. What is stated in the examiner's report is a report on the National Bank of Kentucky, I take it, gathered from the officers of the company. Evidently, the officers of the Company had told him about it. I do not know anything about it. I never heard of it until after the bank closed. I do not know that the Examiner was correctly advised.

I did not know that there were large loans to the Kentucky Wagon Works. I knew that the Wagon Company investment was carried at approximately \$430,000.00, which was the basis of the trade between the stockholders of National Bank of Kentucky and the Louisville Trust Company. In fact, we took into consideration that asset of the

Allen P. Dodd—Cross

bank as \$437,000.00, as we understood it, and we had it appraised at this time to see if it was worth that amount. We knew that much of the bank's assets were invested in the Wagon Company at the time of the consolidation. There had been charge-offs, charging it down to that. I knew the Bank owned the plant; all they needed was a deed to it. They had purchased it at a court house door sale and the Bank was carrying it until they could get a deed to sell it and get the money out of it.

I knew the Murray Rubber Company was a borrower, but it wasn't a large borrower when I came there. I knew it became a large borrower during the time I was there. It was not a local industry. It was located in Trenton, New Jersey, and had been in the Bank a long time. The Murray Rubber Company loan was between \$200,000.00 and \$300,000.00 when I came into the Bank, as I recall. I cannot carry the exact figures in my head. I did not know anything about the Murray Rubber Company bonds in the investment account of the Bank until long after I went on the Board, possibly at the time I left the Board. They were carried in the investment account and these bonds never came before the board. It reached a total of \$580,000.00 after I left the Bank in January, 1930. In the spring of 1929 we had a report from Mr. Brown that Caldwell & Co. had taken over the Murray Rubber Company and that it would drop down, as he reported to the Board, to less than \$200,000.00. Then it crept back up, but we had assurance that the Bank's problem with the Murray Company was about over. I left the Bank with the feeling that the Murray Rubber Company was to be taken out. I know it wasn't.

I knew the Bank had made a large advance to The Norman Lumber Company, a local company, having saw-mill property in Louisiana. The advance was something like half a million dollars, but it was reported it was a pretty strong company.

Allen P. Dodd—Cross

I didn't know anything about the VanCamp Packing Company or that they were borrowing money, or that the Bank was investing in its common stock. We never heard of that until after the banks closed. I know now Mr. Brown is accused of misappropriating certain of the Bank's funds to buy the stock.

When I left the Bank in 1930 I knew the Consolidated Realty Company was a borrower from the Bank, but my recollection is that they paid out before I left. I knew they owed a lot of money to the Bank, \$400,000.00. That is pretty large. The Bank had a lot of large lines. It was a big bank. \$600,000.00 was the maximum the law would allow and the Consolidated Realty Company owed \$400,000.00 while I was on the Board, but it was paid off before I left, as I remember.

The Herald-Post had borrowed \$400,000.00 as reported to the Board. I knew about that much, but I didn't know it was over a million dollars with the lines consolidated with it. I didn't know anything about that. Since you have brought up the Herald-Post matter, I would like to tell you this: In 1928 I had an opportunity, if I could have gotten Mr. Brown to sell it, to sell it for \$1,500,000.00. I don't know how much the Bank lost in the Herald-Post loan. I know we were sued for \$400,000.00 by reason of the Herald-Post loan in the Bank suit.

When I was in the Bank the Wakefield and Company loan, as a Wakefield and Company loan, ran all the way from \$225,000.00 up to about \$400,000.00. Mrs. Latta was Wakefield and Company. The loans subsequently came up in the Bank case because they exceeded the legal limit. They were in the name of Greer, Harris and Schweitzer. All those loans added together made an excessive loan above \$600,000.00.

The Kentucky Wagon Works was an investment. I knew it was \$437,000.00. We had an appraisal of the Kentucky

Allen P. Dodd—Cross

Wagon Works of over \$1,000,000.00 when we went in, and we hoped that that would be worked out by a sale as quick as we got a deed to the property, which we did not get until December, 1928. There was never a loan made to the Kentucky Wagon Company that I knew of, while I was on the Board, except one time there was a discount of receivables and we were told that they were merely carrying it to sell it. They never did sell it. It was well known that the Kentucky Wagon Works was a work out of an old debt. It was never intended to be profitable.

The increase in the capital stock of the National Bank of Kentucky, about which I testified in direct examination, just prior to the unification of the Bank with the Trust Company, was a 60% stock dividend. No new money was subscribed to the Bank. There was a stock dividend declared and paid out of the surplus and undivided profits of the Bank. The Board of the Bank met and distributed to its stockholders additional certificates of stock equal to 60% of its then capital. The Comptroller of the Currency approved every step they took. They reduced the Bank's surplus and undivided profits with the Comptroller's approval. The Comptroller even went further and congratulated us on the splendid bank we were going to be affiliated with. That was in 1927.

The Bank's deposits, taken from plaintiff's exhibits and tabulated, were, as of the published statements and leaving off odd thousands and cents—June 30, 1927—\$44,000,000.00; October 10, 1927—\$47,000,000.00; December 31, 1927—\$45,000,000.00; February 28, 1928—\$45,000,000.00; June 30, 1928—\$40,000,000.00; October 3, 1928—\$37,000,000.00; December 31, 1928—\$42,000,000.00; March 27, 1929—\$38,000,000.00; June 29, 1929—\$35,000,000.00; October 4, 1929—\$41,000,000.00; December 31, 1929—\$40,000,000.00; March 27, 1930—\$38,000,000.00; June 30, 1930—\$39,000,-

Allen P. Dodd—Cross

000.00 and September 24, 1930—\$37,000,000.00. The average deposits were \$41,852,235.18.

In June, 1927, the Bank's deposits were \$44,000,000.00 and on June 29, 1929, they were \$35,000,000.00, a decline of about \$10,000,000.00 in deposits between the unification of the banks and the formation of Banco Kentucky Company. It went back up after we organized Banco, and made reciprocal deposits back and forth. That Bank's deposits varied sometimes \$5,000,000.00 a week—county bank deposits. On November 16, 1930, the Bank's deposits were about \$27,000,000.00. On the nearest date to the unification they were \$44,000,000.00. They had shrunk after the run on the Bank by November 15, 1930, to about \$27,000,000.00. September 24, 1930, they were \$37,000,000.00. That is a shrinkage of more than 40% in the Bank's deposits. We had a run of some \$12,000,000.00 or \$13,000,000.00 the last week of the Bank.

The Comptroller of the Currency did not congratulate us in June, 1929, when we organized Banco Kentucky Company. He never said anything about it. He did not condemn it.

I purchased 800 shares of Banco stock and signed that subscription ticket which everybody else signed. I knew the plan to which I was subscribing well, and approved it very much. I borrowed the full amount of the purchase price from the Louisville Trust Company and put up the stock plus \$8,500.00 additional collateral. At the time the Louisville Trust Company closed that loan had not been paid, but I paid it off before a year after the Bank closed. I reduced it to \$4,000.00 in January, 1930, and paid the balance off before the end of that year. Prior to the closing of the Bank I had paid \$4,000.00 on the principal. They called on me and I had to pay it. I did not want to do it.

October 4, 1929, was the first time Banco minutes noted

Allen P. Dodd—Cross

the matter of the increase of the company's capital, "the President talked at length relative to propositions with Cincinnati, Indianapolis and Covington banks." He also talked at great length regarding the matter of increase of the capital of BancoKentucky Company. It had been discussed before. The resolution to make the increase in capital from 2,000,000 to 5,000,000 shares was not adopted until January, 1930.

The first reference in BancoKentucky minutes to how much stock was to be set aside for Trustees' Participation holders and how much was to be offered for sale, was in the minutes of September 20, 1929,

"motion was made, seconded and carried, setting aside temporarily, 1,150,000 shares of BancoKentucky Company stock for the National Bank of Kentucky-Louisville Trust Company Participation shareholders. A motion was made, seconded and carried authorizing the President, in his discretion, to close negotiations with broker or brokers for the sale of two hundred fifty thousand (250,000) shares of BancoKentucky Company stock at not less than Twenty-five (\$25) dollars per share."

The minutes do not say how much was to be sold. There is a sale of only 250,000 shares; that left 600,000 shares, but we had a report that they had already been sold. I never saw the contract referred to in the minutes with Byllesby and other brokers which turned out to be an option for 250,000 shares until after the Bank closed. I do not know what lawyers on the Bank Board examined it and I don't know that any lawyer on the Board saw it. I don't know that any lawyer represented the National Bank of Kentucky in the drafting of it.

If the 600,000 shares had been sold at Twenty-five (\$25) dollars per share, that would have produced \$15,000,000.00.

Allen P. Dodd—Cross

That is what we thought we had sold. I know now we never had \$15,000,000.00. At that particular time when this meeting was held, we didn't have any money.

The stock market crash occurred in October, 1929. At that time the banks were owned by BancoKentucky Company and were hard pressed for money.

If BancoKentucky Company had \$15,000,000 from the 600,000 shares and the 250,000 shares had been sold that would have added \$6,000,000 more, all about \$21,000,000. The 250,000 shares were to be paid for, as we understand it, over a period of six months. The \$15,000,000 were by subscription which were called on September 19 to be paid October 1, 1929, so, that at the time of the stock market crash, we would have had our money. I didn't know how much money we had at the time of the stock market crash. I thought we had \$10,000,000 or \$11,000,000. I know we didn't have \$15,000,000. I did not know that we were unable at that time to supply cash to our banks. We supplied a lot of cash to the banks.

I recall Mr. Ormsby very well. He was Vice-President of the National Bank of Kentucky and a director of BancoKentucky Company. The National Bank of Kentucky had borrowed up to the limit at the time of the stock market crash. I don't know that it had no more paper, that it could rediscount with the Federal Reserve. I know it had borrowed a considerable amount of money. I don't know what the limit was. I do not know that it could not borrow any money from the Federal Reserve. I did not consult the Federal Reserve and they didn't consult me. I knew we borrowed some money in New York for BancoKentucky Company,—\$1,000,000. I knew the National Bank of Kentucky needed more money—that both of our banks needed more money. Mr. Ormsby was, in October, 1929, sent to New York to see if he could borrow money, as I under-

Allen P. Dodd—Cross

stand, for the BancoKentucky Company. This was in October and the stock market crash was in October, but the borrowing of the money occurred in November, right after the stock market crash. On November 8, 1929, there is a resolution adopted by the BancoKentucky Company authorizing the borrowing of money by that Company. I don't know anything about the National Bank of Kentucky borrowing. I was a director of the National Bank at that time, but they didn't consult us, the directors, every time they wanted to borrow money. They had authority to do it.

Subscriptions for BancoKentucky stock were callable and payable October 1, 1929. I don't know that it was necessary for Banco to borrow any \$1,000,000 on November 8, 1929. I knew the Bank was a heavy borrower. Directors were not consulted every time they borrowed money. I was present at the meeting of the Board of Directors of the National Bank of Kentucky, October 25, 1929, when that resolution was passed, ratifying the loan made to the Bank October 21, 1929, by the Guaranty Trust Company of New York and when the Board ratified and approved the act of H. D. Ormsby executing the note of the Bank payable on or before 60 days after date for that loan. I knew Mr. Ormsby had borrowed money for the Bank. I had voted that resolution. After borrowing the \$1,000,000 from the Guaranty Trust Company, we gave Mr. Ormsby this resolution of BancoKentucky Company in November. At that time he borrowed \$1,000,000 from the Chemical Bank for the BancoKentucky Company.

863—So, the BancoKentucky Company did not have at that time, in November, \$1,000,000 available, did it?

A.—Oh, yes.

864—It did?

A.—Yes.

865—Where was it?

Allen P. Dadd—Cross

A.—In the bank.

866—But the bank had used up that cash?

A.—It owed the Banco Kentucky Company the money it had on deposit.

867—It didn't have any free money that it could give to the National Bank of Kentucky?

A.—It had all of its money deposited in the bank.

868—That was a claim on the bank?

A.—It was a deposit.

869—If the bank needed more money, the Banco Kentucky Company could not give it any more?—that is a fact—if you had \$1,000,000 on deposit at the bank, you could not supply an \$1,000,000 by using that \$1,000,000?

A.—You put down two and take two from it and it leaves zero. If you take two and add two to it, it makes four. Why not get along with the facts of this case?

870—What I am trying to show is that the National Bank of Kentucky needed money at that time in order to survive.

A.—I don't know if the National Bank of Kentucky needed money at that time in order to survive. It was borrowing money. Not all people who borrow money need it to survive.

871—This was not a loan made by the National Bank of Kentucky, but was made by the Banco Kentucky Company?

A.—Yes, it was borrowed by Banco Kentucky Company in New York and deposited in the National Bank of Kentucky to the credit of Banco Kentucky Company. That was done.

872—Banco didn't need any money at that time?

A.—No, sir; not that I know of. I don't know what it needed.

873—So, that money was borrowed for the National Bank of Kentucky?

Allen P. Dodd—Cross

A.—It was borrowed—you can look in the records and see what it was for. Don't try to substitute me for what the books show.

874—What I am asking you is—it was borrowed for the National Bank of Kentucky, but was borrowed by the Banco Kentucky Company—it was borrowed for the use of the National Bank of Kentucky in order to add every available bit of liquid cash?

A.—You can draw that assumption, but the records will show whatever was the necessity for it.

875—I don't want it to stand as an assumption; I want facts.

A.—I don't know whether it is a fact or not.

876—You were a member of the Board of both institutions?

A.—I was a member of the Board of both institutions.

877—You are familiar with the Ormsby loan?

A.—I am familiar with the Ormsby loan. It was nine years ago, but—

Mr. Crawford: I object. That is argument.

The Court: No; I don't think so.

A.—I stated the purpose of it, as I recall it, was to assist the Bank of Kentucky.

878—That is what I wanted to get.

The stockholders of the National Bank of Kentucky and Louisville Trust Company, who owned the Trustees' Certificates, had a preemptive right in the original plan of Banco Kentucky Company to take all of its stock. The stock was offered to them by letter of July 19, 1929. Later, after the original offer had been made, we did not take steps to abolish that preemption. The preemptive right to subscribe for any increase in the capital stock was the matter that was taken up on the amendment and that preemptive right was taken from them by a vote of the stockholders

Allen P. Dodd—Cross

at the January meeting of 1930. That is different from the original offering.

The subscribers to Banco stock had a preemptive right under the laws of Delaware, to subscribe for and pay for the increase ratably. In January, 1930, the stockholders voted a waiver of that preemptive right so that it could be sold to the public generally. That was not at the time it was put on the Chicago Stock Exchange. 2,000,000 shares had been put on the Chicago Stock Exchange in the fall of 1929. The Participation Certificate holders were given the preemptive right to subscribe and pay for stock in addition to what they secured by exchange. Before it was placed on the stock exchange or sold to the public, the Trustees' Participation Certificate holders could have subscribed for the whole issue and if it had been subscribed it would have been pro-rated. That was the offer. That was part of the plan devised by the stockholders and directors of the two banks. That was terminated by the directors of the Bank and Trust Company in a letter to the Trustees' Certificate holders on September 12, 1929, when they issued to the stockholders of the Bank the letter, plaintiff's Exhibit 24-5, which concludes: "If it is your intention to exchange your Trustees' Certificates, or buy additional shares in Banco-Kentucky Company, you should do so on or before September 15, 1929, as the privilege given you in the letter of July 19th, 1929, to exchange or subscribe for additional shares, terminates on that date."

The right terminated by the very terms of the offer unless extended, and they refused to extend it by that letter.

889—Yesterday, I asked you, on the Brighton Bank in Cincinnati, and Pearl Market Bank in Cincinnati, if in September, before you declared the plan operative or effective, you had not made commitments which practically exhausted your available cash? Now, I want to ask you, in

Allen P. Dodd—Cross

addition to that, whether the commitments to buy those two banks didn't call for paying them all cash or cash and stock, at the option of the seller?

A.—That is right; I think it shows for itself.

890—And if the sellers of the Brighton and Pearl Market Banks had demanded all cash, it would have required \$7,683,000, wouldn't it?

A.—Yes, I imagine so—whatever the proposition shows.

891—And in addition to that, the Central Savings Bank, which was bought in November, cost \$329,000, didn't it?

A.—I will take your word for it; you have got the record—it is all in here.

The Court: That is all part of the record.

On direct examination, I said that Banco necessarily would have expenses. It had no salaried officers. It had no separate quarters. It never did get the time or opportunity to get separate quarters. On direct examination, I said the reason was that it was not determined when, or which, building was going to be occupied by the Bank, and that remained a matter of uncertainty up until the end. I gave June, 1930, as the date when it was finally determined. I think that was the date. I won't be bound by that date.

898—If you take the minutes of June 21st, at which the Banco Kentucky Company was formally launched, it refers in those minutes to which building the Bank of Kentucky was going to occupy?

A.—I don't recall what it says in the minutes.

The Court: You mean the National Bank of Kentucky was going to occupy?

Mr. Marx: Yes. The names are very similar.

The Court: I think it is important to call it the National Bank of Kentucky because of the similarity of the names.

Allen P. Dodd—Cross

The minutes of June 21, 1929, the same day that Banco was formally launched, refer to the building the National Bank of Kentucky intended to occupy. The Bank, in that minute, proposed to occupy 421 West Market Street; that was determined at the very time Banco was ordered organized. That reminds me of the fact that sometime after that it was stated that Banco would occupy offices in that new building when the Bank of Kentucky went there. The Louisville Trust Company was already at 421 West Market Street.

As I remember it, I may be wrong when speaking entirely from recollection, the old Louisville Trust building at 5th and Market Street was vacant at that time.

904—So, there wasn't any reason why the BancoKentucky Company, if it was going to occupy an office at 421 West Market, could not immediately occupy that office?

A.—It was then occupied by the Louisville Trust Company.

905—But that was owned by Banco just the same as the National Bank of Kentucky?

A.—The stock, the Trustees' Participation Receipts were owned, but it was a big question of room, actual room, space. We had those buildings surveyed half a dozen times, back and forth, to see if they had enough room to accommodate the banks.

906—You didn't need much room to accommodate the BancoKentucky Company?

A.—As contemplated, it would have required considerable room.

907—I say as it actually operated?

A.—As actually operated, no, but as contemplated, if we had been able to establish the plans of Banco, it would have taken considerable space.

Allen P. Dodd—Cross

908—Leaving out of consideration ideas on this, as a matter of practice, the BancoKentucky Company only kept two or three little books?

A.—It kept the set of books you introduced here.

909—Those could be held in a drawer?

A.—You have got the books here. If they could be held in a little drawer, the Court's opinion is as good as mine.

910—Its correspondence could be held in a correspondence file?

A.—I don't know but that anybody's correspondence can be kept in some correspondence file.

I recall testifying about BancoKentucky Company before the Grand Jury at Jefferson County, Kentucky, investigating from February 23rd to February 27, 1931, the financial crash in Louisville of November 17, 1930, including the BancoKentucky Company. I testified before the Grand Jury that BancoKentucky Company was organized without \$1 of the stockholders' money except the recording fees. What I meant by that was that they did not pay any commission for the sale of its stock. It had its expenses, of course, attorney fees—we didn't hire a lawyer and not expect to pay him. No salaries were paid that I know of. I have learned since there have been a lot of claims put in for salaries and expenses.

Mr. Tom ZurSchmiede, and his assistants, I understand, did all of the work done at the bank.

“The Court: I don't think there is any dispute about that.

The Witness: There hasn't been, no, sir.”

It was an essential part of the plan of the formation of the BancoKentucky Company that not only was that company to own a substantial majority of the Trustees' Participation shares, but the holders of the Trustees' Participation shares prior to the formation of Banco, should hold

Allen P. Dodd—Cross

the majority of the shares after its incorporation. That is set up in the letter of July 19th.

"The Court: Can you state from independent recollection about the thing, whether or not the holders of Trustees' Participation shares were to be the majority stockholders in Banco?

The Witness: That is my recollection, but I would rather that the answer would be confined to the document itself. It says here, Section 7: 'It is an essential part of this reorganization that the shares of this corporation (or at least a substantial majority thereof) be owned by the Trustees' Participation shareholders, and that it be managed and operated by the Board of Directors and the officers of the two banks.' "

It was an essential part of the plan, as set forth in this letter, that a majority of the shares of stock of Banco Kentucky Company be owned by the Trustees' Participation shareholders.

From the compilation made by Mr. Shuck showing the holders of Banco Kentucky shares as of November 15, 1930, the date of the closing of the Bank, showing a total of 2,472,468, I made a list of the shares of stock purchased by the directors alone. That list is of the stock the directors purchased and paid for during the whole life of Banco. It represents the stock that they subscribed for initially. My list shows Mr. Vogt subscribing for 8,850 shares. The original subscription book of Banco Kentucky Company shows Mr. Vogt only subscribed for 2,200 shares at \$25 per share, a difference from my figures of 6,650 shares or \$108,000.

The Court suggested that since Mr. Shuck collected the materials from which Mr. Dodd made his computation, and would later be on the stand, that further cross-examination on this matter be deferred until Mr. Shuck took the stand.

Allen P. Dodd—Cross

I mentioned in direct examination that there was the idea of BancoKentucky Company going into the title insurance business and the business of title examination. It never went into the title insurance business or the title examination business. To get into the title insurance business in Kentucky, certain legal formalities have to be complied with. One of them was an application to the Superintendent of Insurance—getting a permit to do business in Kentucky. To get a permit to do business you have to deposit securities or collateral with the Insurance Commissioner. The BancoKentucky Company never made any such application. The plans never progressed that far. They never deposited any securities. It never did get to that point in its development. They made no title examinations. It never did get into business.

I mentioned the subject also of originating first mortgage real estate bonds. BancoKentucky Company never originated any first mortgage bond issues. It never got that far in its plans. As far as first mortgage bond issues were concerned, the Louisville Trust Company were selling first mortgage bonds with its guarantee and had been for a number of years but it never was able to supply the demand.

These bonds that were originated by the Louisville Trust Company were first mortgage bonds on various tracts of real estate. The Louisville Trust Company was a guarantor not the maker. Some of those bonds were secured by the deposit of collateral or trust deeds and mortgages on real estate and some of them were direct. In cases where there was a deposit of collateral, they used some other company as trustees. They used the Louisville National Bank & Trust Company and the National Bank of Kentucky as I remember. Possibly, they used the United States Trust Company. The question of the trustee was a

Allen P. Dodd—Cross

question of a satisfactory trustee and his willingness to act. At the time the Trust Company closed they had outstanding more than \$4,000,000 of those collateral trust bonds, I think.

As far as the ownership of insurance company stock, about which I spoke on direct examination, the only insurance company stock that BancoKentucky owned was \$25,000 of the Union Central Life Insurance Company stock.

There was a greater demand for first mortgage bonds than the Trust Company could supply so we did not need any selling organization but we contemplated going into the security business beyond anything that had been done here in Louisville before and we expected to have quite a selling agency. If we could have originated those bonds we hoped to use these banks to place them. We did not need any selling organization at the time, but if we had gotten the plans of the BancoKentucky Company going, we would have needed a selling organization.

I said during my direct examination that the whole plan was conditioned on our having a \$30,000,000 cash reserve. That was the discussion before we ever organized. The conditioning the plan upon our having a \$30,000,000 cash reserve or more was in the preliminary discussion and was actively set forth as a part of the plan, and approved up until—during the whole organization we were trying to get back to that. We started off with that in mind. It stayed in our minds until the very close.

I cannot show you any place in the minutes where there is any reference to that. Many things happen that there is no reference to. There is no reference in the letter of July 19, 1929, which sets forth the plan and states its essentials, to the back-log of \$30,000,000 but it refers to the charter of the BancoKentucky Company and that charter is very broad. It gives authority to do everything we felt we could

Allen P. Dodd—Cross

do. In the subscriptions to shares of Banco Kentucky Company there is no reference to the fact that the whole plan was conditioned on a \$30,000,000 cash reserve.

970—In other words, you can't show me any place in writing in any of the corporate records or minutes or plans where there is any reference to that fact that the whole plan was conditioned on a \$30,000,000 cash reserve?

A.—It is not set out in the minutes and I never said it was in the minutes.

971—I asked you if you can show me any place in writing, in the entire history of Banco where that is set forth?

A.—I will answer that plainly: There is no reference anywhere in the minutes to a \$30,000,000 reserve to meet the situation that I discussed of the plan, but I call your attention to the fact that the capital stock was 2,000,000 shares, at \$25 a share, and after the first subscription we immediately increased it from 2,000,000 to 5,000,000, and I say, although it was not in the plan as written, that that was discussed and it was understood that the purpose of that increase was to gain that reserve.

It was planned that this third corporation which was to be added, as part of the plan of re-organization, to the Bank and Trust Company, was to engage in functions prohibited by law to banks and trust companies. That is what the letter says and if I may explain—what they had in mind—was that the Banks could not underwrite securities, had no right to underwrite bond issues, and had no right to go into the investment business. National banks had branches here but have no right to have branches outside the community.

I said in answer to Mr. Crawford's question that there was no secret about the plan of Banco Kentucky Company. I think everybody knew it, if they read the newspapers. It looks like they ought to have known it. The newspapers

Allen P. Dodd—Cross

simply reprinted either in haec verba or in substance the letter of July 19, 1929. I don't know how many newspapers it was published in. I saw some of the articles myself and the plan, the letter of July 19th was published.

The activities of Banco such as the purchase of additional banks in Cincinnati and the purchase of banks in Covington and purchase of the bank in Paducah and Ashland and subsequently the Security Bank in Louisville were all published in the newspapers as well as the acquisition of the Caldwell & Company interest.

At the time we organized Banco, it was thought in the Bank that it would be a pretty good plan to denationalize the National Bank of Kentucky. It was the collective judgment of the six Trustees that it would be a good thing to denationalize the National Bank of Kentucky.

On September 27, 1929, a document was signed by the directors of the two institutions to denationalize and there is the agreement of the stockholders to denationalize. It was signed by the Advisory Committee and addressed to the Trustees. I was one of the Trustees. This paper marked "Consent of Advisory Committee," addressed to the Trustees, is not dated. It appears in the Trustees' minute book immediately after the subscription of the shares of the Banco Kentucky. It orders the Trustees, holding all the stock of the National Bank of Kentucky, to place the Bank in voluntary liquidation under Secs. 5220 and 5221 of the United States Revised Statutes. A charter for the State Bank was drawn and the organization tax of \$4,000 was paid to the State of Kentucky. That was paid out of the assets of the National Bank of Kentucky to secure a charter for a State Bank. The determination to liquidate the National Bank of Kentucky was made four days before the call date for the subscriptions to shares of Banco Kentucky Company. It was the plan of the National Bank of Ken-

Allen P. Dodd—Cross

tucky, I would say, dating back until June at least, to denationalize—to go out of the national system. What we intended to do was to liquidate the National Bank of Kentucky and transfer the assets as a going concern to a State Bank to pass from one system into another. As Trustees, as stockholders of the Bank, we approved the step. Mr. Vaughan handled it for the Bank as I recall. You will have to ask him about the details.

After having gone through all the formal resolutions and certifying the liquidation to the Comptroller of the Currency and paying money to the State of Kentucky for a State Bank Charter, we postponed the carrying out of the plan from month to month.

The postponement was not because we had made application to the Federal Reserve Bank of St. Louis, to get the new State Bank admitted into the Federal Reserve System. An application had to be made. I didn't know anything about the Federal Reserve Bank writing that if the State Bank intended to take over the assets of the National Bank of Kentucky, it would be necessary to eliminate more than \$4,000,000 of the substandard assets and to eliminate the concentration of loans on Banco stock.

1015—I am talking about knowledge.

A.—They sent such a letter to Mr. Charlie Jones and Mr. Brown.

1016—And sent a copy of it to Mr. Vaughan?

A.—I don't believe Mr. Vaughan will state that. I never knew anything about it, as far as being a Trustee.

1017—You know now, and have known for a long time?

A.—Since the Bank closed.

I don't think a copy of that letter was sent to Mr. Vaughan—that is the so-called criticized assets were not furnished to him at least. I mean the list of criticized assets. A copy of the letter was sent to him but the letter

Allen P. Dodd—Cross

did not give him all this information you are giving me now as an interrogatory. Before we went into the Federal Reserve, we were told by officers that we would have to submit an application and that that could not be given at once. They had no assurance when the Federal Reserve would give the examination. The officers of the Bank of Kentucky gave that excuse to me for extending the time for liquidation. There was no assurance that if we made the National Bank of Kentucky into a State Bank, we could get into the Federal Reserve at any time, but we needed to get in because the stock market crash was coming along.

I testified in the directors' case "There was no assurance that if we made the National Bank of Kentucky a State Bank that we could get the privileges from the Federal Reserve. At that time, we hadn't sold enough stock to furnish us the cash necessary for the reserve which we expected when we organized Banco. For that reason it was necessary for us to remain in the Federal Reserve System until the stock market situation adjusted itself and the stock struck a level and we could see what was coming."

I was one of the members who brought the suit for the receivership for the Banco Kentucky Company. I was a member of that company's Executive Committee. The style of that case is *Carroll v. Chemical Bank & Trust Company*. Plaintiff's Exhibit 66 is the petition in equity in the Jefferson Circuit Court, Chancery Branch Division, No. 205-223. The allegations in that bill are correct.

I testified on cross-examination, in the case of *Louisville Trust Company v. the National Bank of Kentucky*, growing out of the dispute over 421 W. Market St.

I don't know what I said yesterday when you asked me whether I did not know these bank examiners were in the Bank before we organized Banco, or just before we organized it. In the building case, I was asked "With refer-

Allen P. Dodd—Cross

ence to this particular date, June 21st, did you know the examination was made as of the 25th, that the National Bank Examiners with a large force had come in?", and I answered, "We undoubtedly knew that they were there."

I was asked the question, "Regardless of when it was read to the directors, you knew the Bank had been examined beginning the date after the Louisville Trust Company moved into No. 421 W. Market Street," and I answered, "I don't say we knew the day, but I say we undoubtedly knew the Bank Examiners were there. There was quite a force and we knew it." Yesterday, I said I could not tell what days they were there. From some of your questions, you elicited a different answer; you used this statement: "Didn't the National Bank Examiner and his force move into the National Bank of Kentucky?" You were a little bit more polite in your question there.

I did know that the National Bank Examiner was there. I had to know that, because I did know they made an examination of the Bank. What I didn't want to do was to confine myself to the exact day they started and the exact day they ended; we knew it because we had what purported to be a complete report of the examination read. I couldn't tell you now whether I knew that later or at the time. The answer is undoubtedly I knew that they were there, and I still say undoubtedly, I did know they were there but what day they stopped, I couldn't tell you to save my life nor how many examiners they had there either, I would be a remarkable man if I could.

I signed certain reports of the condition of the Banks they brought to me. At one time, I don't remember when, the statement showing the Bank was a very heavy borrower—that some \$14,000,000 was being borrowed by the National Bank of Kentucky.

It was a hope, more of a hope than a plan, to put the two banks into one banking house. It was hoped from the be-

Allen P. Dodd—Cross

ginning of the unification of the two banks that the two banks could be housed in one building. In the early history of the unification, we actually appointed a committee to try to do that. We did that two years after the unification, in 1929, and finally gave up the idea that the two could be housed in one bank in January, 1930.

1053—(Interrupting.) But you still clung in January, 1930, to the denationalization plan?

A.—That extended over until March.

1054—It was not until March, 1930, that you finally abandoned the denationalization?

A.—Correct.

1055—When you found you could not get into the Federal Reserve?

A.—No, sir. I didn't find that out. The reason why the Trustees—they were advised as to why it was given up. It was because there was no opportunity to market the stock of the BancoKentucky Company at that time in a sufficient quantity to raise the money we started out to raise in the first instance, which was the plan as I stated it to you awhile ago, of having some \$30,000,000 in BancoKentucky in reserve to manage this system.

1056—What did the ability of BancoKentucky to market additional stock in March, 1930, have to do with the denationalization of the National Bank of Kentucky?

A.—As we understood it—as we were advised, but for the stock market crash, there never would have been a checkup or stop in the final denationalization. We had reached—we did not have sufficient stock to carry out our plan, and we were then endeavoring first, to get additional stock, and but for the stock market crash, if we could have got that additional stock on the market, we would have gone out of the system. That was as the plan was stated to us. Now, there were conditions the directors didn't know anything

Allen P. Dodd—Cross

about that the Bank officers did know, that is, there were conditions made to the Bank by the Federal Reserve Bank at St. Louis, that certain assets had to be removed from the Bank, and certain things had to be done as a condition precedent to the state bank getting into the system, but what I am saying to you is that the directors did not know anything about those conditions.

After abandoning the denationalization plan in March, 1930, we took up the plan of actually physically consolidating the Bank and the Trust Company, so that legally there would be only one institution, in the fall of 1929, and again in the summer of 1930, as a matter of saving expenses in the matter of the operation of the institutions and making more money for the stockholders. We were searching for some plan to eliminate expenses. The banks were working all right, so far as the directors were concerned.

We appointed a committee on the plan to consolidate. Mr. Carroll represented the Bank and I represented the Louisville Trust Company. Mr. Vaughan and Mr. Castleman were on the committee. We worked on the plan sometime in August, as I remember, August or September; just before the Bank closed. Nothing was done about it. The trouble about it was the possibility of losing trust estates; we were trying to consolidate them without doing that; that was the thing that was giving us the headache.

We bought an interest in Caldwell & Company.

1064—Let's see what you testified before, as to whether you consummated any such deal: Isn't it a fact that although there was a contract drawn up, that the contract was not consummated on its terms as written, and it was thoroughly understood that it was a scale contract and nothing was to be done until after the securities were valued, and the securities were never valued and the contract was never consummated?

Allen P. Dodd—Cross

A.—Who said that?

1065—A gentleman by the name of Allen P. Dodd, testifying before the Grand Jury of this County, under oath.

A.—All right, you read that question to me.

1066—"In your experience as a lawyer and director of a bank, would you say that Caldwell & Company contract was consummated. A. Of course, the contract was not consummated on its terms as written but let me be plain on the proposition, when I left the Board of Directors meeting on May 26th, it was thoroughly understood that the only contract to be made with Caldwell & Company was to be a scale contract and nothing was to be done until after the securities were valued. I didn't think a contract would ever be drawn. When I got back to Louisville, I understood nothing had been delivered. The contract was never consummated, because half of the stock was held here subject to an appraisement. It was not consummated except as to 500,000 shares of stock. The other 400,000 shares were held in the Louisville Trust Company."

A.—I made that answer, yes, but not the way you undertook to show it.

1067—Was that correct?

A.—Yes, that was a correct answer. I didn't vote for that contract, and I only gave you my understanding about it when I got back, and that is correct. It was a scale contract.

It was my understanding that the purchase price would be held by Banco Kentucky Company until after its own appraisement so that, if the assets proved to be of no value, it would not have to be delivered.

Before the Jefferson County Grand Jury, I was asked this question, "Was this good or bad for Banco Kentucky?" and I made this answer, "It was bad, simply because Caldwell & Company went smash in November and the making

Allen P. Dodd—Cross

of this contract as presented to me and as I thought of it, it was a contract that couldn't hurt the BancoKentucky because the purchase price would be held in its till until after its own appraisement and if the assets proved to be of no value, it didn't have to deliver anything under the contract."

The Court sustained defendants' objection to further questions along this line and plaintiff made the following avowal: That Mr. Dodd, if permitted, would say that he had been asked the following questions and that he had made the following answers:

"Q. 'If the contract had been drawn as you thought it was going to be done, they were not to deliver anything until the appraisal was made? A. The contract had to go through if Caldwell & Company guaranteed its assets to prove out on our appraisement, we couldn't stop the contract from going through if his appraisements held, and neither could we. In other words, the escrow agent was to hold the stock until it was appraised and proved up. Q. (Here Mr. Allen, Foreman, read two clauses of the contract.) Do these two clauses imply the meat of the contract you had in mind when they were discussing it in May, 1929,—I am bringing out this point that the assets of BancoKentucky were listed in total by the assets of the company which they were going to purchase it would take 12 months to find out what they were? A. My understanding was before I left here that the Caldwell & Company would guarantee it had a net worth of nine million, subject to our appraisal and that we were to deliver nothing until that appraisement was had, although we would put the stock in escrow."

Then, he is asked a question, and plaintiff avows that if permitted to answer he would say:

"Q. 'In previous meetings which you attended were there other directors agreeing on that phase as to the

Allen P. Dodd—Re-direct

way it was to be handled? A. That was the only way it was intended to be handled. Caldwell & Company were attempting to make connections with Banco-Kentucky. If they made a preliminary contract and then that contract was not carried out the effect would be disastrous to any banking house to have it turned down. If the preliminary contract was drawn and the basis of trade was worked out and then on the appraisalment the net worth turned out to be five million instead of nine million dollars, the contract could have gone through but the price would have been scaled down on the basis of 5 to 9. If his assets didn't price according to us to more than two million and he wanted to turn out he could do so, but if he wanted to go on, we had the right to back out.' "

Banco-Kentucky never made any appraisalment or audit of the assets of Caldwell & Company, and never paid any dividends on the stock allocated to Caldwell in the deal, that I know of. I think I have checked the records and found that to be true.

Caldwell & Company owned an interest in banks. As to how much it was, I don't know. I don't know that they owned a controlling interest in banks or that through insurance companies they owned additional banks, you will have to ask Mr. Donovan.

I don't know that the directors borrowed \$670,000 from their own bank to pay for Banco stock. I don't know how much they borrowed.

On re-direct examination by Mr. Crawford, Mr. Dodd testified as follows:

I was asked about certain letters from the Comptroller of the Currency and referred to in the minutes of the Bank. As I recall, six letters were noted in the minutes of the directors of the National Bank of Kentucky as having been received and read to the directors, and referred to the

Allen P. Dodd—Re-direct

directors for action. Among the letters was one, Mr. Marx read to me yesterday a part of it, it was the minutes of December 16, 1927, June 1, 1928, June 22, 1928, August 21, 1928, and December 7, 1928.

I was present June 1st, June 22nd and December 7th and absent the other three. At the meetings I attended, there was no reference to any letter from the Comptroller at any time. No letter was read to the Board at any meeting including those meetings and no minute was ever read that showed that at a former meeting a letter was read from the Comptroller from June 7, 1927, until I left the Board in 1930.

I never heard from any Director at any time or from anybody that a letter from the Comptroller had been referred to or a minute read referring to a letter from the Comptroller at any meeting when I was not present. I never heard of a letter coming from the Comptroller's office to the Bank of Kentucky while I was on the Board.

I was present when testimony was taken in the director's case in which there was a question of whether these letters had been read to the Board or whether any minute in reference to these letters had been read to the Board.

Plaintiff's objection to the Master's ruling on that subject was sustained and the following, from the Master's report was offered as an avowal:

"Defendants' Exhibit No. 1—Vol. 1, p. 301:—

I do not think that any of these letters reached the Board of Directors notwithstanding the recitation in the minutes to this effect. The Minute Books now indicate that there were six such letters presented and read to the Board, namely: December 16, 1927, page 304, of the Minute Book; June 1, 1928, p. 318 of the Minute Book; June 8, 1928, p. 319 of the Minute Book; June 22, 1928, p. 320 of the Minute Book; August 31, 1928, p. 325 of the Minute Book; and December 7, 1928,

Allen P. Dodd—Re-direct

p. 332 of the Minute Book. It is satisfactorily established that the minutes, after being read to the Board, were fraudulently altered, so as to show the presentation and consideration of these letters. The concealment of these letters from the Board, and the fact that such questionable, not to say dangerous, means were resorted to to accomplish it, demonstrate the character of the collusion with which the directors were unknowingly surrounded."

Exceptions were filed to that finding.

When the Bank and Trust Company's stock was trusted in 1927, a committee of Trust Company directors was appointed which had appraisal of the Wagon Company made at that time. Mr. Hieatt made the first appraisal when we were negotiating the unification. He was the largest individual stockholder of the Louisville Trust Company.

As I recall, the reported value of that appraisal at that time was more than \$1,000,000. In 1928, shortly after the National Bank of Kentucky procured a deed to the Wagon Company property, Mr. Harry Goodman, Mr. C. C. Hieatt and Mr. Bob Martin were appointed a committee or were employed as realtors or real estate agents in Louisville to make a detailed appraisal of the Wagon Company properties. They made that appraisal and reported to the Bank Board. This copy of that appraisal was obtained by the bank in 1928. It is dated May 11, 1928, and shows the value of the Wagon Company properties to be \$2,077,732. Mr. Hieatt was and is one of the outstanding real estate men in this locality. He was a former President of the National Realtors Association. Mr. Martin is a prominent real estate broker in Louisville. He had been connected with the valuation department of the City Tax Office for many years prior to that time. Mr. Goodman is a real estate broker

Timothy Graham Donovan—Direct

here of the highest standing. His firm is Semonin, Goodman & Company.

(Continuation of Re-Direct Examination of Allen P. Dodd.)

The Bank of Kentucky had from three to four hundred country bank accounts all the time. The deposits of Bank of Kentucky would fluctuate from week to week several million dollars. One week they would be up and the next down; it would vary backwards and forwards. It was explained to the Board there were so many country bank accounts that the withdrawal by country banks who would withdraw deposits would vary the amount of the deposits very much.

Photostatic copies of the claim of Paul C. Keyes, Receiver of the National Bank of Kentucky, dated April 8, 1931, the claim of Frank Dugan dated April 8, 1931, and W. T. ZurSchmiede's claim against the Banco Kentucky Company, filed with the Receiver of Banco Kentucky Company, were marked for identification "Defendant's Exhibit 7."

Timothy Graham Donovan,

called for defendants, examined by Mr. Crawford, testified:

My full name is Timothy Graham Donovan. I live and have lived in Nashville, Tennessee, practically all my life except for six years which I spent in Atlanta, Ga. I become associated with Caldwell and Company on January 27, 1925. That company had been in business since 1917. From December 9, 1926, to the time of the receivership of Caldwell and Company, I was Secretary and a member of its board of directors.

Caldwell and Company started in September, 1917, and until approximately 1920, engaged exclusively in municipal bonds, and principally Southern municipal bonds. Along about 1920, Caldwell and Company acquired the interest of

Timothy Graham Donovan—Direct

Frank and Norton Marr, who had conducted a brokerage business there for a long time; it was an old house, well known. The Marr brothers' father had conducted a private banking business in Nashville since the Civil War and after that had continued to own a stock brokerage business.

The original charter of Caldwell and Company permitted it to deal in securities, stocks and bonds. In 1922 the charter was amended to permit wider operations in the securities field and following that the Company went into the first mortgage real estate bond business, both underwriting and financing. Along in 1922 or 1923 they branched out into the underwriting and financing of first mortgage real estate bonds. They financed the erection of the Kentucky Hotel and subsequently the financing of the Beha Laundry Company. Of course the securities market from 1923 until 1925 changed, and Caldwell and Company entered into the stock field. Following the purchase of stock they branched out into the underwriting of industrial securities of their own, that is, corporation finance. Subsequent to 1923 Caldwell and Company participated in many syndicates both as an origination group, selling group, buying group, and what-not of securities throughout the country.

Caldwell and Company had participation in national issues. At that time it had built up a considerable reputation and was known as the largest investment house in the South. It was invited into practically all the new financing of issues. It was nothing unusual to have participation in issues originated by J. P. Morgan, Halsey Stewart and Dillon Reed. It had also built a reputation as a distribution house and by that I mean it had offices in twenty-two cities. It had offices in Chattanooga, Tenn., Louisville, Cincinnati, Chicago, Detroit, St. Louis, Kansas City, and up to 1929, in New York City. At that time it was necessary to incorporate under a different name in New York because of a

Timothy Graham Donovan—Direct

duplication of names, as Caldwell and Company and they incorporated under the name of Rogers Caldwell and Company, which was a New York corporation. The Company had offices in New Orleans, Birmingham, Knoxville, Greensburg, S. C., and in 1929 and 1930 it had offices in San Francisco, Jackson, Miss., Bristol, Tenn., Columbia, S. Car., Dallas, Texas, Montgomery, Alabama, Jacksonville, Florida, Tampa, and they had offices at one time in Miami during the winter season. There were 22 principal offices in all.

From 1926 on I think the business of Caldwell and Company ran around \$40,000,000.00 in the sale of securities and in 1929 it reached \$75,000,000.00 in securities and I think for the first four or five months of 1930 the sale of securities was around \$37,000,000.00, which, of course, at that time, was maintaining the average of sales.

In the early part of 1930 Caldwell and Company's assets consisted of and were principally investments in securities, consisting of Certificates of Deposit and we had a small amount invested in Liberty Bonds, foreign bonds, industrial bonds, municipal bonds and stocks.

Plaintiff objected to the question and the answer of the witness Donovan, regarding Caldwell's assets consisting of bank stocks, on the ground that the books and records were the best evidence. In response to the Court's questions the witness testified that he did not have the books available; that he had consulted them with a view to testifying to that fact; that he had testified to that fact in many other cases involving Caldwell and Company; that he was in charge of the books and was responsible for them, and that he knew approximately the amount of bank stock held by that company in the first part of 1930, and plaintiff's objection was overruled. Plaintiff made a further objection on the ground that the books and records of Caldwell and Company were not within the jurisdiction of the court and that

Timothy Graham Donovan—Cross

where a witness is permitted to testify with reference to figures shown in books and records, such books and records must be within the jurisdiction of the court.

Q. How much relatively of your assets was bank stock?

A. I am taking the range of the early part of 1930. I would say they were relatively small. The total in the Caldwell books between January and May would represent not 5% and certainly not over 10%—they would be less than 10% of the total investment in securities.

Mr. Marx: I move to strike out that answer on the grounds previously stated. I am not thoroughly familiar, if your Honor please, with the details of Caldwell and Company—I don't know that any human being is—but if the books were here, I am informed that they would show that in addition to controlling directly certain banks through stock investments, they controlled indirectly, through their control of other companies, certain additional bank stocks, and that this answer is fundamentally false.

The Court: My point is that I don't see that it has any consequentiality. That is the reason I am permitting him to answer.

Mr. Marx: It was considered to be a chain of banks in the Federal Reserve.

The witness: I am telling you Caldwell & Company were not a banking institution and had nothing to do with the Federal Reserve Bank.

Mr. Marx: I move to strike that statement out. It was not in answer to any question.

The Court: Let it be stricken out, but I am overruling your motion to strike out his answer to the other question.

On cross-examination by Mr. Kasfir, Mr. Donovan testified:

Prior to May, 1930, Caldwell & Company had 10,000 shares of stock outstanding. Those shares were not listed.

Timothy Graham Donovan—Cross

on any exchange. It was a closed corporation. Rogers Caldwell owned the entire 10,000 shares. The stock market crash was in November—October, 1929. After the stock market crash, sales of securities were curtailed, but the security market did not dry up. At that time, subsequent to that time, Caldwell & Company took steps to save expenses. It closed down some of its offices, several, I would say 3, 4, or 5 or 6 or 7. Practically all the salesmen were not eliminated from the force. To the contrary, in the spring of 1930, they had a sales school to develop additional salesmen with the idea that they were going from there into the retail sale of securities. It is not true that the principal business of Caldwell & Company was floating municipal issues. You will find, by looking, that corporation and industrial securities exceeded municipal bonds in 1929. My company did not make any campaign to sell Banco stock. They sold some, however. You recall that in July, 1930, there was a further decline in the market. We did not acquire BancoKentucky Company stock until June, 1930. From that time on until the failure of Caldwell & Company we did not put on a campaign to sell Banco stock but we did sell some.

The receivership of Caldwell & Company occurred November 13, 1930. No request was made by any of the officers or directors of Banco to Caldwell & Company to conduct any campaign for the sale of BancoKentucky Company stock that I knew of. We sold four or five thousand shares of BancoKentucky stock.

There may have been some discussion between Mr. Caldwell and Mr. Brown between June, 1930, and the receivership of Caldwell & Company regarding request by Banco to sell any other issues backed by Banco, but to my knowledge I can't answer that. I don't know of any issue of stock floated by BancoKentucky which it asked Caldwell & Company to sell on the market from May to November, 1930.

Timothy Graham Donovan—Cross

Banco was paying dividends of 20¢ a share every quarter. Caldwell & Company received a check in June, 1930, for \$180,000.00 as dividends. I don't know that we were requested to return it. The records of Banco show that check was issued to Caldwell & Company. I endorsed it and sent it back. The contract between Caldwell & Company and Banco Kentucky Company provided for an examination of the former's assets within a year after May 28, 1930. It provided that 200,000 shares of stock was to be placed in escrow with the Louisville Trust Company. There was nothing in there about the consummation of the contract; it was simply—it was, to my mind, consummated, but subject to the determination of the values of Caldwell & Company, why, 200,000 shares of Banco was put in escrow with the Louisville Trust Company pending such investigation.

We received in all 900,000 shares of Banco. This \$180,000.00 represented a dividend on that amount of stock. In spite of the fact that the contract said we were to deposit 200,000 in escrow, we returned the entire \$180,000.00 to Banco Kentucky. It was my thought that although the contract was consummated, we were not entitled to any of those dividends in June, 1930, because the examination of the assets of Caldwell & Company had not been completed. The next quarterly dividend came in September, 1930. I don't recall that a check was issued to us for that dividend. My recollection is that a check was not issued. We received no part of the September, 1930, dividend. I think there was some discussion between Mr. Caldwell and Mr. Brown about that check but the details of it I don't recall at this time.

I received the original of plaintiff's Exhibit 104, a letter sent me by Mr. ZurSchmiede which enclosed this \$180,000.00 check. I signed plaintiff's Exhibit 105. That is my letter, returning that check.

Timothy Graham Donovan—Cross

My testimony in regard to the ownership of banks by Caldwell & Company was with respect to direct and indirect ownership. Caldwell & Company had a large stock interest in the Missouri State Life Insurance Company held through the Insurance Securities Corporation. Of course, if you are going to reach out like that—I still say the assets of Caldwell, regarding investments in bank stock were very small.

We didn't keep a record of what Missouri State Life held with respect to bank stocks. Through Insurance Securities Corporation, we did control a large block of Missouri State Life but we didn't hold a controlling interest in Missouri State Life at that time. Caldwell & Company did, in 1930, own a controlling interest in Inter-Southern Life, and had from 1926 on. After May, 1930, Inter-Southern Life held 116,000 shares of Missouri State Life, approximately 30% of Missouri State Life's stock. I don't know how many banks Missouri State Life held. Caldwell & Company bought a 60% interest in the Home Life Insurance Company in 1929. In the early part of 1930 that interest was taken over by the Inter-Southern Life Insurance Company.

When I speak about the ownership of the bank, I am speaking about stock in banks that Caldwell & Company had in its portfolio which it could offer for sale. In other words, you have some evidence of ownership of bank stock. If you own Missouri State Life, you can't represent that you own banks any more than a man who owns stock in C.I.T. can claim he owns every automobile in Louisville. When I told Mr. Crawford that Caldwell & Company's bank stock assets were 5 to 10% of its total assets I had reference to direct ownership. I meant there wasn't more than 10% of bank stock in Caldwell & Company's portfolio that it could use as security or offer for sale. I was not

Timothy Graham Donevan—Cross

speaking of any interest in bank stock which some subsidiary corporations of Caldwell & Company might have owned. The Home Life Insurance Company owned stock at a large number of banks in Arkansas. Quite a few small country banks. Something like 30 or 40. I don't think it went as high as 100. I don't think it went as high as 70. My recollection of that is 25 or 30 banks in a small section at Arkansas.

Caldwell & Company did not have an interest in the Southwestern Life Insurance Company of Texas, but Missouri State Life did. I don't know whether Southwestern owned any banks in Texas. I have never seen a statement of Southwestern.

Plaintiff requested that the witness produce the books and records so that he could be cross-examined regarding the percentage of Caldwell & Company's assets in bank stocks.

The Court: If you care to, you may take the deposition of this witness at Nashville on cross-examination to determine what those records show.

Caldwell and Company did own a controlling interest in Inter-Southern Life Insurance Company in May, 1930, and it held approximately 29½% of Missouri State Life—116,000 shares out of 400,000 outstanding at that time. Mr. James Caldwell, father of Rogers Caldwell, was chairman of the board of Missouri State Life Insurance Company. Rogers Caldwell was on the executive committee of the Missouri State Life. The other members of the executive committee were Mr. C. G. Arnett and Mr. Hillsman Taylor. Mr. Arnett was President of Inter-Southern Life Insurance Company and Mr. Hillsman Taylor was attorney for Rogers Caldwell back in 1922. From that time Mr. Taylor was attorney for the Cotton State Life, but never for Caldwell & Company. In 1923 Caldwell bought the Cotton States

Timothy Graham Donovan—Cross

Life, which was then in Memphis. Subsequently he consolidated it with other companies and it went into the Inter-State Life Insurance. Hillsman Taylor was attorney for Cotton States Life. Mr. Charles McCabe, now collector of Internal Revenue at Nashville, was President.

Shortly before May, 1930, Missouri State Life bought certain securities which the Inter-State Life Insurance Company had transferred to the Nashville Trust Company. Missouri State Life bought the securities coming out of this trade from the Fourth and First National Company, a subsidiary of Fourth and First National Bank. Insurance Securities Corporation received \$2,040,000.00. It was not a trade, it was a sale of securities to the Missouri State Life. The sale was on a repurchase agreement of the Inter-Southern Life to the Nashville Trust Company at Nashville. This \$2,040,000.00 paid off the one year notes of the Insurance Securities Corporation. Those notes were guaranteed by Caldwell & Company and the Fourth and First National Company. The day after the stock market crash certain securities were sold by Caldwell & Company to the Missouri State Life Insurance Company on a repurchase agreement.

Caldwell and Company had a very nominal investment in the Fourth and First. We sold our stock in that in 1929 and got out. Mr. James Caldwell, Rogers Caldwell's father, had no interest in Caldwell & Company. Caldwell & Company owed the Fourth and First one million dollars but that was nothing unusual. We owed the Chase and the Chemical one million dollars. It was nothing unusual for us to borrow.